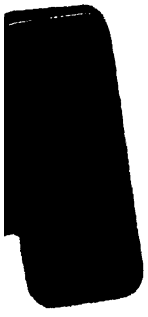

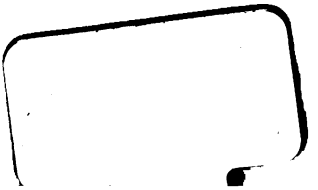

A DIGEST

OF

ENGLISH CIVIL LAW

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BY

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BOOK III

SECTIONS I (*continued*) AND II

LAW OF PROPERTY (*continued*)

BY

EDWARD JENKS

LONDON

BUTTERWORTH & CO.

BELL YARD, TEMPLE BAR

Law Publishers

BOSTON, U.S.A., THE BOSTON BOOK CO.

1912

THE UNIVERSITY PRESS, CAMBRIDGE, U. S. A.

SCHEME OF THE WORK

CONTENTS OF THIS VOLUME

BOOK III. LAW OF PROPERTY (*continued*)

PROPOSED CONTENTS OF REMAINDER OF BOOK III

A. LAND (*continued*)

SECTION III — RESTRICTIONS ON USER AND ALIENATION OF LAND

TITLE I — CONDITIONS (how far lawful and enforceable, destruction of, alienation and severance, waiver and licence, relief against forfeiture)

TITLE II — COVENANTS (binding (a) at law, and (b) in equity, different effects of each)

SECTION IV — VOLUNTARY ALIENATION OF LAND

TITLE I — ABSOLUTE CONVEYANCE INTER VIVOS (definition, forms, compulsory registration)

TITLE II — CONVEYANCE BY WAY OF MORTGAGE (forms, rights of mortgagor and mortgagee, consolidation and tacking)

TITLE III — CHARGES ON LAND (liens, debentures)

SECTION V — INVOLUNTARY ALIENATION OF LAND

TITLE I — ADVERSE POSSESSION

TITLE II — PRESCRIPTION

TITLE III — MISCELLANEOUS (bankruptcy, execution for debt, forfeiture)

SECTION VI — OVER-RIDING POWERS OF ALIENATION AND MANAGEMENT

TITLE I — POWERS OF APPOINTMENT

TITLE II — STATUTORY POWERS OF LIMITED OWNERS

CONTENTS OF BOOK I

CONTENTS OF BOOK II, PART I

CONTENTS OF BOOK II, PART II

CONTENTS OF BOOK II, PART III

CONTENTS OF BOOK II, PART III (*continued*)

B. TORTS (*continued*)

CONTENTS OF BOOK III

A. LAND

5

PREFACE

THIS volume completes the task, begun in the preceding volume, of defining the various interests in land recognized by existing English law. It is possible that, to the modern reader, a few of the rarer interests specified in Title IX of Section I (Hereditaments Purely Incorporeal) may appear to be of antiquarian rather than practical importance; nevertheless, in a country such as England, studded with survivals of ancient rights, they are liable at any moment to come before the Courts. A few still rarer, though theoretically possible, have, from considerations of space, been omitted. It is believed, however, that Title IX contains the completest statement of its subject to be found anywhere in compact form.

Of the contents of Section II a special word must be said. The critic may well object, that the rights and liabilities specified in that Section should have appeared in the volumes dealing with the Law of Torts. In fact, such a treatment would clearly have been logical, except in rare and anomalous cases, e. g. that of the liability specified in § 1336, which is, apparently, enforceable only by the Crown. But, as a matter of practice, it is not customary to treat of such rights and liabilities under the head of Torts; and, illogical as the distinction may be, it is consecrated by the usage, not merely of English Law, but of Continental systems.

The origin of the distinction is suggestive to the student of legal history. It is, apparently, to be found in the fact that, in the process of legal development, certain offences against proprietary interests are, for purely practical reasons, recognized as grounds of action, long before any general theory of proprietary rights is formulated. Consequently, such injuries acquire a special place in the scheme of law; and, with the inevitable conservatism of legal institutions, continue to be regarded from the negative standpoint of liabilities, rather than from the corresponding standpoint of rights. Thus, Blackstone, and other early institutional writers, were justified historically, though not logically, in dividing their subject-matter into Rights and Wrongs of Persons, Property, &c.; though the logical codifier may realize that such a scheme inevitably involves repetition — in the case of this work avoided by a system of cross-references. But if an analytical jurist, such as Austin, were able to review his task, he would probably now realize, that his department of 'Sanctioning Rights and Duties' was either a mere intrusion of procedure into substantive law, or else an unnecessary *tertium quid*. A somewhat analogous developement of the Law of Contract has been pointed out in the Preface to Volume II of this work; and, in this connection, it is significant that the English Law of Simple Contract, as is well known, appeared historically under the disguise of an Action of Tort.

Although, as a matter of course, the whole of this volume (as also of the other volumes of the work) has been drawn straight from first-hand authorities, the draftsman desires to make special acknowledgement of the help derived, in compiling Section II, from the valuable collection of cases in Mr. H. S. Theobald's *Law of Land* (London, W. Clowes & Sons, 1902).

The authors of this work have reason to congratulate

themselves on the appearance of the present volume so soon after that of its predecessor; and they trust that its successor (which, it is hoped, will complete the Law of Real Property) will appear early in the course of next year.

LONDON, March, 1912.

TABLE OF STATUTES

SECTIONS I (*continued*) AND II

TABLE OF CASES

SECTIONS I (*continued*) AND II

ERRATA AND ADDENDA IN PRECEDING VOLUMES

Page 14, § 35, note. Add: "As to leaseholds, see *Hastings Corpn.* v. *Letton* [1908] 1 K. B. 378."

Page 45, § 107, note. For "*Miller's*" read "*Milner's.*"

Page 73, § 159. Insert between sub-pars. (*c*) and (*d*) a new sub-par.:

"In the case of a claim for infringement of copyright — a period of three years;"

Copyright Act, 1911, s. 10.

Page 76, § 162, line 1. Omit "by."

Page 83, § 179, line 1. Insert after "charge," the words "on land."

Page 91. Between lines 13 and 15, insert "Estoppel, 32, 33."

Page 386, § 822 (i) (*θ*). Add to the authorities: "*Cope* v. *Sharpe* [1911] 2 K. B. 837."

Page 449, § 914, note. Add: "The doctrine of common employment applies to claims by an infant (*Bass* v. *Hendon U. C.* (1912) XXVIII T. L. R. 317)."

Page 570, § 1067. As marginal note, read "*No merger.*"

Page 589, line 3. For "1984" read "1894."

Page 595, line 16. For "(1904)" read "[1904]."

Page 629, § 1146, note (b). Add: "If the lease was made after 1881, an assignment made after 1911 entitles the assignee of the reversion to enforce conditions broken before the assignment (? in respect of the past breach) (Conveyancing Act, 1911, s. 2)."

Page 656, line 28. For "1173" read "1174."

Page 662, § 1181, note (a). For "*Ashford,*" read "*Ashforth*"; and for "*Whiteby*" read "*Whitby.*"

Page 682, § 1201, note. For "Werd's and Knight's Case," read "Ward's and Knight's Case."

Page 785, § 1355, note (a). *Hyman* v. *Rose*, was reversed on the facts in the House of Lords ((1912) XXVIII T. L. R. 432). But the principle for which the case is quoted was not impeached.

BOOK III

SECTIONS I *(continued)* AND II

PROPERTY *(continued)*

A—LAND *(continued)*

NOTE.

All alterations in the law made since the issue of the previous volumes are noted in the list of Errata which appears in the present volume. By noting up in the earlier volumes the list of Errata, subscribers can keep their volumes absolutely up-to-date.

to do some specific act or acts on, over, or affecting such land, or to require the occupant of such land to do or refrain from doing some specific act or acts which, but for such right, the occupant of such land would be entitled to refrain from doing or to do.

[The existence of incorporeal hereditaments (sometimes called, to distinguish them from estates in expectancy, "hereditaments purely incorporeal") was early recognized by English law; though, by reason of their 'intangible' character, there were difficulties with regard to their transfer which ultimately made it necessary to create

or convey them by deed of grant and not by a feoffment. And it is not very difficult, in spite of their antiquity, to indicate the origin of the more important classes of incorporeal hereditaments. Franchises (*post*, §§ 1200–1236) were the natural outcome of a feudal system in which the mesne lords were always claiming royal privileges. Easements and profits were the inevitable results of the break-up of the communal system of tillage — a process which went on from the thirteenth century to the nineteenth. Tithes (*post*, §§ 1280–1286) represent the claims of the Church to maintenance; and, according to the views of the Church, should have been matter for the ecclesiastical courts alone. In England, however, the struggle between State and Church in the twelfth century decided that they, as well as advowsons (*post*, §§ 1270–1279), should be brought within the jurisdiction of the lay courts. Rents (other than rents service, which are incidents of tenure and not incorporeal hereditaments) were one of the numerous expedients adopted to evade the strict ecclesiastical doctrine of usury. Proprietary offices (*post*, §§ 1295–1300), now rare, were, in the Middle Ages, the common method of rewarding or securing skilled service; they are classed as real property, because they were protected by remedies similar to those which protected interests in land. Peerages and ceremonial offices are matter of public law, and, though some of them bear in many respects a striking analogy to interests in land, are not really proprietary; because they have long since ceased to be transferable otherwise than by inheritance. Therefore they are not dealt with in this work.]

No new kinds

1188. Only such incorporeal hereditaments as have previously been recognized by the Courts will now be recognized. A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property.

Keppell v. *Bailey* (1833) 2 Myl. & K., at p. 535, *per* Brougham, C.
Ackroyd v. *Smith* (1850) 10 C. B., at p. 188, *per Curiam*.
Hill v. *Tupper* (1863) 2 H. & C., at p. 127, *per* Pollock, C. B.

[This doctrine, though now clearly established in theory (see, however, the remarks of Lord Herschell, C., in *Simpson* v. *Mayor of Godmanchester* [1896] 1 Ch., at p. 219), is, probably, not very old,

and is not always strictly observed in practice. And it must, of course, be carefully remembered, that there is no legal objection to the creation of novel *contractual* rights over land, which will, however, only bind the parties, or, at the most, on equitable principles, and then only if they are of a negative character, purchasers who acquire with notice of them, and volunteers (*post*, § 1313). It is to the creation of new proprietary burdens, available, as *jura in rem*, against all persons, with or without notice, that the law objects.]

Interests in

1189. Incorporeal hereditaments (not being advowsons[a]) are not the subject of tenure; and no estates can be created in them. But —

(i) interests analogous to estates can be created in incorporeal hereditaments, without technical words, in accordance with the intention of the parties;[b] and, generally speaking, such interests, both as to the construction put upon them, and the respective rights and liabilities of successive owners against or towards one another,[c] will be governed by the rules affecting analogous limitations of estates;

(a) Co. Litt. 85 a.
Hartopp's and Cock's Case (1627) Hutt. 88.

(b) Co. Litt. 20 a.
Nevil's Case (1604) 7 Rep., at 33 b (tail).
Moore v. *Lord Plymouth* (1817) 7 Taunt. 614 (tail).
Davis v. *Morgan* (1825) 4 B. & C. 9 (years).
Hewlins v. *Shippam* (1826) 5 B. & C. 221 (fee simple).
Wood v. *Leadbitter* (1845) 13 M. & W., at p. 843.
Booth v. *Alcock* (1873) L. R. 8 Ch. App. 663 (years).
Pym v. *Harrison* (1876) 33 L. T. 796 (life).
McManus v. *Cooke* (1887) 35 Ch. D. 681 (fee simple).
Lord v. *Dynevor* v. *Tennant* (1888) L. R. 13 App. Ca. 279 (fee simple).

Rymer v. *McIlroy* [1897] 1 Ch. 528 (fee simple).
Fitzgerald v. *Firbank* [1897] 2 Ch. 96 (years).
Grove v. *Portal* [1902] 1 Ch. 727 (years).

[No rent service can, however, be reserved by a subject out of an incorporeal hereditament (Co. Litt. 47). And even a contractual rent made payable on a grant for life of an incorporeal hereditament was unenforceable at common law (*ibid.*). The action of debt was extended to the latter case by the Landlord and Tenant Act, 1709, s. 4.]

(c) The opportunities open to the limited owner of an incorporeal hereditament of committing waste at the expense of his successors in title are, from the nature of the case, small. But it is laid down by Coke (Co. Litt. 53 a) that if the "tenant" of a franchise makes an excessive use of his rights, he will be liable for waste; and though in *Moyle's Case* (n. d.) Noy, 70, it was said that destroying coney-burrows is not waste, it is generally assumed that this *dictum* does not apply to a legal warren by charter or prescription (*Lurtin* v. *Conn* (1850) 1 Ir. Ch. Rep., at p. 276). The rule against limiting a freehold to commence *in futuro* (*ante*, § 1173) applies to the conveyance of an existing incorporeal hereditament, though not to the creation of such a hereditament *de novo* (*Wrotesley* v. *Adams* (1559) Plowd. 197, *per Curiam*; *Vicars Choral of Litchfield* v. *Ayres* (1639) Sir W. Jones, 435.) The doctrine, countenanced by *Smartle* v. *Penhallow* (1701) 1 Salk. 188, to the effect that, on the death of the owner of an interest *pur autre vie* in an incorporeal hereditament, no special occupant being named in the grant, the interest would come to an end, because there could not be general occupancy of an incorporeal hereditament, was definitely overruled by the Court of Common Pleas in *Bearpark* v. *Hutchinson* (1830) 7 Bing. 178. It is clear that such an interest can be devised under the Wills Act, 1837, s. 3. Though it seems to have been only recently that the Rule against Perpetuities has been held to apply to incorporeal hereditaments (see Gray, *Perpetuities*, §§ 314–316), there can be no doubt that it does now apply (*Edwards* v. *Edwards* [1909] A. C. 275), and so, presumably, does the so-called Rule against Double Possibilities (*ante*, § 1179). But it must be carefully remembered, that the Rule against Perpetuities restricts only the commencement, not the continuance, of the interest (*S. E. R. Co.* v. *Associated Portland* [1910] 1 Ch. 12). There seems to be no reason why the principle of Merger (*E. of Carnarvon* v. *Villebois* (1844) 13 M. & W. 313), and the Rule in Shelley's Case, should not apply to successive interests in incorporeal hereditaments; but, presumably, there can be no failure of a contingent

interest in such a subject matter, on the ground of the failure of the particular estate, because such failure cannot cause an abeyance of seisin. When an incorporeal hereditament is let by the year, or from year to year, the lessee is only entitled to reasonable notice to quit, not to six months' notice (*Lowe* v. *Adams* [1901] 2 Ch. 598). Easements and profits cannot, strictly, be either excepted or reserved *de novo* on a conveyance of the servient tenement; for such incorporeal hereditaments do not exist at the time of the grant, and therefore cannot be excepted, nor do they issue out of the land, therefore they cannot be reserved (Co. Litt. 47 a; *Douglas* v. *Lock* (1835) 2 A. & E., at p. 743). But, if the deed is executed by the grantee, such an exception or reservation may operate as a grant by him of the incorporeal hereditament (*Wickham* v. *Hawker* (1840) 7 M. & W., at p. 76, *per* Parke, B.; *Lord Dynevor* v. *Tennant* (1888) 33 Ch. D. 420).

(ii) subject to § 1191, an incorporeal hereditament which, by act of the parties, becomes vested in the owner or occupier for the time being of the land on, over, or in respect of which it is exerciseable, in the same right as that in which he holds such land, will be extinguished or suspended for the benefit of such owner or occupier;

Litt. ss. 558–561.
Co. Litt. 313.
Nelson's Case (1585) 3 Leon. 128.
Tyrringham's Case (1584) 4 Rep. 36 b.
Bradshaw v. *Eyr* (1597) Cro. Eliz. 570.
R. v. *Hermitage* (1692) Carth. 239.
James v. *Plant* (1836) 4 A. & E., at p. 761, *per Curiam.*
Ecclesiastical Commrs. v. *Kino* (1880) 14 Ch. D. 213.
Richardson v. *Graham* [1908] 1 K. B. 39.

[In order that the incorporeal hereditament may be extinguished, and not merely suspended, the estates of the servient owner in both tenements must be not merely in the nature of a fee simple, and in the same right, but equally "perdurable" (*R.* v. *Hermitage*, *ubi sup.* at p. 241, *per Curiam*; *Thomas* v. *Thomas* (1835) 2 C. M. & R.

34). And there must be no derivative estate, the enjoyment of which would be injured by the extinction (*Richardson* v. *Graham*, *ubi sup.*).]

(iii) any real estate consisting of any interest in an incorporeal hereditament which, by reason of the death intestate and without an heir of the owner thereof, cannot be claimed by any beneficial successor, will be subject to the law of escheat, notwithstanding any devise to trustees by the late owner.

Intestates Estates Act, 1884, s. 4.
Re Wood [1896] 2 Ch. 596.
Re Bond [1901] 1 Ch. 15.

[This curious enactment declares that, in the above case, "the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments." A corporeal hereditament is an estate; and, if it is a fee simple, it passes by the law of escheat, on the death of the last purchaser and owner intestate and without heirs, to the next lord of the fee. But an incorporeal hereditament is not an estate; and, therefore, there can be no lord of it. And so, at the passing of the Act, the law of escheat could not possibly apply in such a case; even if a man who has devised to trustees can be said to die intestate. *Quære:* in the event of the death intestate and without heirs of the grantee of a perpetual rent charge issuing out of land held of a manor, would the rent charge go to the Crown or to the lord of the manor?]

Appendant

1190. An incorporeal hereditament is said to be 'appendant' when, by a general rule of law, the title to it is, in the absence of contrary evidence, presumed to be annexed to the enjoyment of another heredita-

ment, corporeal or incorporeal.[a] Incorporeal hereditaments appendant cannot be created (otherwise than by Act of Parliament) at the present day.[b]

(a) *Case of the Hundred of C.* (1497) Y. B. 12 Hen. VII, Pasch. pl. 1.
Withers v. *Iseham* (1552) Dyer, 70 a.
Hill v. *Grange* (1556) 1 Plowd. 164.
Tyrringham's Case (1584) 4 Rep. 36 b.
Wyat Wild's Case (1609) 8 Rep. 78 b.

(b) *Anon.* Y. B. (1534) 26 Hen. VIII, Tr. pl. 15.
Baring v. *Abingdon* [1892] 2 Ch., at p. 379, *per* Stirling, J.

[Reasons have been given (e. g. Scrutton, *Commons and Common Fields*, ch. II) for thinking that the technical difference between 'appendancy' and 'appurtenancy' does not date from the earliest stages of the common law; but it is clear that it can readily be traced back well into the fourteenth century (Y. BB. *Anon.* (1331) 5 Ass. pl. 9; *Anon.* (1336) 10 Edw. III, Hil. pl. 11); and Coke, though he is not very lucid on the subject (Co. Litt. 121 b, 122 a), is obviously familiar with the distinction. The practical differences between appendancy and appurtenancy are not numerous; the most important (other than that alluded to above) being that explained in § 1191. Coke seems to have thought (*loc. cit.*) that an incorporeal hereditament could not be appendant to another incorporeal hereditament. But that view is quite inconsistent with the earlier cases, and indeed with cases quoted by Coke himself in the passage referred to (e. g. *Case of the Hundred of Totcombe* (1410) Y. B. 11 Hen. IV, Trin. pl. 44, and (1412) 13 Hen. IV, Mich. pl. 28). Two other species of common are sometimes treated as resembling appendant rights, because they are not created by grant, express or implied. These are (1) 'common pur cause de vicinage,' and (2) 'common of shack.' The former is, as was said by Coke (Co. Litt. 122 a), and by Willes, C. J., in *Musgrave* v. *Cave* (1741) Willes, at p. 322, merely an excuse for a trespass, i. e. of cattle straying across the boundary of adjacent townships. (*Commissioners of Sewers* v. *Glasse* (1874) L. R. 19 Eq. at pp. 160–1.) The latter was a genuine right of pasture which was exercised over the unenclosed and intercommonable arable fields of a township by the owners between harvest and sowing. (*Sir Miles Corbet's Case* (1585) 7 Rep. 5 a; *Cheesman* v. *Hardman* (1818) 1 B. & Ald. 706.) There is an ancient doctrine, of which the meaning and precise application are doubtful, that an incorporeal hereditament append-

ant or appurtenant can only be claimed in respect of a principal subject with which it agrees "in nature and quality" (Co. Litt. 121 b; *Anon.* Y. B. (1336) 10 Edw. III, Hil. pl. 11; *Tyrringham's Case* (1584) 4 Rep. 36 b).]

Partial extinction

1191. When a portion only of the land over or in respect of which an incorporeal hereditament appendant is exerciseable becomes vested in the owner of such incorporeal hereditament, only so much of the incorporeal hereditament is extinguished as is proportionate to the amount of the servient tenement which has become vested in the owner of such incorporeal hereditament. This rule has no application to incorporeal hereditaments appurtenant.

Tyrringham's Case, ubi sup.
Wyat Wild's Case (1609) 8 Rep. 78 b.

Appurtenant

1192. An incorporeal hereditament is said to be "appurtenant" when, by virtue of a grant, express or implied, actual or presumed, it has been created, or is deemed to have been created, by the owner of the servient tenement, to be enjoyed as ancillary to, and along with, the enjoyment of a principal hereditament corporeal or incorporeal ("dominant tenement").

Co. Litt. 121.
Sir Henry Nevil's Case (1570) Plowd. 377.
Tyrringham's Case, ubi sup.
Sacheverill v. *Porter* (1637) Cro. Car. 482.
Atkyns v. *Clare* (1671) 1 Ventr., at p. 407, *per* Hale, C. B.
Hanbury v. *Jenkins* [1901] 2 Ch. 401.
Staffordshire and Worcestershire Canal v. *Bradley* [1912] 1 Ch. 91.

Apportionment

1193. If a part of the dominant tenement to which an incorporeal hereditament is appendant or appurtenant is conveyed away by the owner thereof "with the appurtenances," the incorporeal hereditament, if divisible, will be apportioned; and a part thereof, proportionate to the part of the dominant tenement conveyed to him, will pass to the alienee, if the burden on the servient tenement is not increased by the division.

Co. Litt. 122 a.
Anon. (n. d.) Hobart, 235.
Spooner v. *Day* (1636) Cro. Car. 432.
Sacheverill v. *Porter, ubi sup., per Curiam.*

[*Quære:* since the passing of the Conveyancing Act, 1881, s. 6, is it necessary for this purpose to use the expression "with the appurtenances"?]

Benefit of dominant tenement

1194. The owner of a tenement cannot claim, as appurtenant to that tenement, an incorporeal hereditament wholly unconnected with the enjoyment of that tenement.

Ackroyd v. *Smith* (1850) 10 C. B. 164 (easement).
Bailey v. *Stephens* (1862) 12 C. B. N. S. 91. } (profits).
Lord Chesterfield v. *Harris* [1908] 2 Ch. 397. }
Staffordshire and Worcestershire Canal v. *Bradley* [1912] 1 Ch. 91.

[Lord Gorell, in delivering the judgment of the majority of the House of Lords in the unsuccessful appeal of the defendant in the *Chesterfield* case ([1911] A. C. at p. 637) appeared to think that the right claimed as appurtenant must not only be connected with the enjoyment of the dominant tenement, but proportionate to the needs of such tenement. Is there not here a confusion between appendancy and appurtenancy?]

Passing without words

1195. Subject to § 1275, incorporeal hereditaments appendant and appurtenant pass by a conveyance of the dominant tenement to which they are annexed, without express words.

Co. Litt. 121 b.
Whistler's Case (1613) 10 Rep. 63 a.
Conveyancing Act, 1881, s. 6 (4).

[It should be noted, that even express general words, unless clearly to that effect (*Doidge* v. *Carpenter* (1817) 6 M. & S. 47), will not pass rights not in existence at the date of the conveyance —i. e. will not create such rights *de novo* (*Baring* v. *Abingdon* [1892] 2 Ch. 374). And by the provisions of the so-called statute *De Prærogativâ Regis* (17 Edw. II, ann. 1324) c. 17, a grant by the King of a manor, even "with the appurtenances," does not pass knights fees, dowers, or advowsons, without express mention (*Whistler's Case*, *ubi sup.*) It was also said by the Court in *Higgins* v. *Grant* (1583) Cro. Eliz. 18, that a demise for years of a manor by a private person would not pass an advowson appendant; unless the words "with the appurtenances" were used.]

Severance

1196. An incorporeal hereditament appendant[a] or appurtenant[b] cannot (? without the consent of the owner of the servient tenement) be severed in enjoyment from the dominant tenement.

(a) *Musgrave* v. *Cave* (1741) Willes, at p. 322, *per* Willes, C. J.
Jerdon v. *Millward* (1782) 3 Doug., at p. 73, *per* Lord Mansfield, C. J.

(b) *Drury* v. *Kent* (1603) Cro. Jac. 15.
Daniel v. *Hanslip* (1672) 2 Lev. 67.
Johnson v. *Barnes* (1872) L. R. 7 C. P. 592; 8 C. P. 527.
Ormerod v. *Todmorden Mill* (1883) 11 Q. B. D., at p. 172, *per* Bowen, L. J.

[In the two earlier of these cases, however, the Court seemed to think, that if the right was of a character so definite that it could

not be increased, e. g. a right of common for a specific number of cattle, it might be severed from the dominant tenement; and this view was adopted by Bowen, L. J., in the case last cited. And in *Musgrave* v. *Cave* (1741) Willes, 319, it was actually held that a right of common appurtenant might be demised by copy apart from the manor to which it was appurtenant; whilst in *Bunn* v. *Channen* (1813) 5 Taunt. 243, it appeared that similar rights were in fact demised for years. An advowson appendant can be severed from the dominant tenement (Co. Litt. 122 a).]

In gross

1197. An incorporeal hereditament is said to be "in gross," when the enjoyment of it is unconnected with the enjoyment of any dominant or principal tenement held by the person or persons in whom such incorporeal hereditament is vested.[a] There cannot be an easement in gross.[b]

(a) Co. Litt. 120 b, 122 a.
Mellor v. *Spateman* (1669) 1 Wms. Saund. 343.
Welcome v. *Upton* (1840) 6 M. & W. 536.
(b) *Rangeley* v. *Midland Ry. Co.* (1868) L. R. 3 Ch. App. 306.

[The doctrine that 'there cannot be an easement in gross,' though it can be traced back as far as the fourteenth century (Y. B. (1347) 21 Ass. pl. 1) appears at one time to have fallen into oblivion (see, especially, Blackstone, *Comm.* III, 241; *Bailey* v. *Stephens* (1862) 12 C. B. N. S., at p. 111, *per* Willes, J.; *Mounsey* v. *Ismay* (1865) 3 H. & C., at p. 498, *per* Martin, B.). It has, however, recently been revived with great vigour; and, in its modern form, it is sometimes stated that easements are not incorporeal hereditaments at all, but mere rights appurtenant to corporeal hereditaments (*Re Brotherton* (1908) 77 L. J. Ch., at p. 59, *per* Joyce, J.). The result of the theory is that it drives the Courts to devise other titles to justify rights, of the *de facto* exercise of which there can be no doubt. Thus, rights of recreation (*Fitch* v. *Rawling* (1795) 2 H. Bl. 393, where the word 'easement' is freely used), rights of mooring (*A. G.* v. *Wright* [1897] 2 Q. B. 318), and rights of spreading nets

(*Mercer* v. *Denne* [1905] 2 Ch. 538) have been justified by custom or public law — titles under which it is difficult to exclude from the exercise of the rights in question any person resident in the neighborhood, or even any member of the public who may happen to be temporarily there. In very recent years, there has even been a disposition to extend the doctrine of the text to profits *à prendre*, at any rate in the absence of express grant (see the remarks of Buckley, J., in *Ramsgate Corpn.* v. *Debling* (1906) 70 J. P., at p. 133). Another difficulty arises from the fact, that it has long been established, that rights in the nature of profits *à prendre* cannot be claimed by custom (*Gateward's Case* (1607) 6 Rep. 59 b; *Grinstead* v. *Marlowe* (1792) 4 T. R. 717; *Fitzhardinge* v. *Purcell* [1908] 2 Ch., at p. 163, *per* Parker, J.), otherwise than by copyholders. Here, too, the severity of the rule has led to evasion; for it has been held that profits *à prendre* (*White* v. *Coleman* (1673) 1 Freem. 134) and even franchises (*Cocksedge* v. *Fanshawe* (1779) 1 Dougl. 118, affirmed in the Lords (3 Bro. P. C. 690); *Goodman* v. *Mayor of Saltash* (1882) L. R. 7 App. Ca. 633) may be claimed by prescription on behalf of an unincorporated class (e. g. "inhabitants" or "free burgesses"), either through a corporation, or as a charitable trust. But in *Goodman* v. *Mayor of Saltash*, at p. 658, Lord Blackburn evidently thought that a profit *à prendre* in gross could be claimed by prescription.]

Extinction

1198. If the owner of an incorporeal hereditament appurtenant or in gross purchases part of the land over or in respect of which such incorporeal hereditament is exerciseable, such incorporeal hereditament is extinguished.

Wyat Wild's Case (1609) 8 Rep. 78 b.
Dennett v. *Pass* (1834) 1 Bing. N. C. 388.

[Apparently, the only cases in which this doctrine has been applied were those of commons and rent charges. *Quære:* as to franchises and easements.]

Remedies for infringement

1199. Any person in whom an incorporeal hereditament is vested, whether in present enjoyment or only in expectancy, may maintain an action for damages and an injunction against any other person who disturbs him in the exercise of his right, and thereby causes him appreciable damage in fact.

Blackstone, *Comm.* III, pp. 236–242.
Leverett v. *Townsend* (1590) Cro. Eliz. 198 (common).
Yard v. *Ford* (1670) 2 Wms. Saund. 172 (market).
Jesser v. *Gifford* (1767) 4 Burr. 2141 (reversioner) } (easements).
Kidgill v. *Moor* (1850) 9 C. B. 364 (") }

[Other remedies, e. g. distress, (*Leverett* v. *Townsend*, *ubi sup.*; *Heddy* v. *Wheelhouse* (1596) Cro. Eliz. 558 (franchise), *Dixon* v. *James* (1698) Freem. 273 (common), and abatement (*Rex* v. *Rosewell* (1698) 2 Salk. 499) are sometimes also available against the disturber. In some cases, no actual damage need be proved (See note to Bk. II, Pt. III, B, Sect. I, § 723, *ante*); but it is difficult to ascertain the true principle of the distinction. Even the Crown cannot grant a patent conferring a franchise which will work a disturbance of another franchise (*R.* v. *Butler* (1679) 2 Ventr. 344); and in some grants an express clause to that effect is inserted (2 Inst. 406). But the usual way of avoiding such a result is to hold an enquiry before granting a market or similar franchise. Such enquiry is not, however, conclusive (*R.* v. *Butler*, *ubi sup.*).]

FRANCHISES

Franchise

1200. A franchise or liberty is a royal privilege which is or has been in the hands of a subject. Franchises recognized by English law are rights of jurisdiction (including the right to goods of outlaws), rights of fair, market, ferry, and toll, rights

to treasure trove, waifs, strays, wreck, free fishery, and royal fish.

Finch, *Discourse of the Law*, Bk. II, Cap. XIV.
22 & 23 Car. II (1670) c. 25, s. 2 ("royalties").
A. G. v. *British Museum* [1903] 2 Ch., at p. 612, *per* Farwell, J.

[Of the magnitude of the franchise question in earlier times there can be no doubt; the *Quo Warranto* proceedings of 1278–9 show that the very existence of the State was once threatened by the extent and multiplicity of these anomalous privileges. Much has subsequently been done, as will partly appear in the §§ dealing with the specific franchises, to curb the license of the feudal franchises; but that such anomalies should survive at all, is one of the strongest proofs of the conservatism of English law.]

Consideration must be shown

1201. Where the allowance of a franchise would impose a burden upon the public generally, or would be inconsistent with the existence of a public right, such franchise will not be supported by the Courts, unless a special consideration can be shown for it.

Haspurt v. *Wills* (1670) 1 Ventr. 71 (harbour dues).
Prideaux v. Warne (1673) Sir Thos. Raym. 232 (do.).
Mayor of Nottingham v. *Lambert* (1738) Willes, 111 (toll in a navigable river).
Truman v. *Walgham* (1766) 2 Wils. 296 (toll on a highway).

[These were all cases of prescriptive claims. But it was said by the Court in *Pelham* v. *Pickersgill* (1787) 1 T. R., at p. 668, that even a grant by the Crown of a toll thorough on an ancient highway without consideration would be bad; and this doctrine goes back at least to the sixteenth century (*Werd's and Knight's Case* (1588) 1 Leon., at p. 232). In *Pelham* v. *Pickersgill*, it was held that a toll traverse could be claimed by prescription on proof that the toll and the soil of the highway were formerly in the same hands.]

Merger in Crown

1202. Franchises which were originally part of the royal prerogative are extinguished by reunion with the Crown; but franchises which could have no existence till created by an actual grant are not extinguished by such reunion.

Abbot of Strata Marcella's Case (1591) 9 Rep., at 25 b.
The King v. *Briggs* (1614) 2 Bulstr., at p. 297, *per* Coke, C. J.

[This doctrine has a very important consequence, viz., that on the regrant by the Crown of a manor to which a franchise of the former class has been appurtenant, the franchise does not pass to the grantee, if at all, without express words; general words being insufficient for the purpose (*The King* v. *Capper* (1817) 5 Price, 217; *A. G.* v. *Marquis of Downshire* (1818) *ibid.* 269). The same distinction is also important in proof of title; for whereas franchises which were 'flowers in the garland of the Crown' can be prescribed for in the ordinary way, franchises which could not exist without express grant *de novo* can only be proved by showing such grant by the Crown, or by proof of allowance by record within the time of legal memory (*Abbot of Strata Marcella's Case*, *ubi sup.*, at ff. 27 b, 28 a; *The King* v. *Briggs*, *ubi sup.*, at p. 297, where franchises of the latter class are described by Coke as franchises 'in point of charter'). The doctrine has been recognized in recent times (*D. of Northumberland* v. *Houghton* (1870) L. R. 5 Exch., at pp. 131–2, *per* Martin and Pigott, BB.; *A. G.* v. *British Museum* [1903] 2 Ch., at p. 612, *per* Farwell, J.).]

Forfeiture

1203. Any franchise may be forfeited by and to the Crown on proof of misuser [a] or non-user [b] by the claimant thereof; except that a franchise which exists only for the pleasure or profit of the owner may not be forfeited for mere non-user.[c]

(a) *City of London* v. *Vanacre* (1699) 12 Mod., at p. 271, *per* Holt, C. J. *Curwen* v. *Salkeld* (1803) 3 East, at p. 545, *per* Lord Ellenborough, C. J.

(b) *Tottersall's Case* (1632) W. Jones, 283.
City of London v. *Vanacre, ubi sup.*
(c) *Leicester Forest Case* (1607) Cro. Jac. 155, *per* Coke, C. J. (The examples given by Coke are a park and a warren.)

[The proper procedure for procuring the forfeiture of a franchise for misuser or non-user is a *Sci. Fa.* (*Islington Market Bill* (1835) 3 Cl. & F., at p. 519); for preventing the usurpation of a franchise, a *Quo Warranto* (*R.* v. *Stanton* (1606) Cro. Jac. 259; *City of London* v. *Vanacre, ubi sup.*). But, where there is an allegation of non-user, either process will be correct; for, until decision, it cannot be known whether the defendant is usurping a new right or trying to revive an old one (*Darell* v. *Bridge* (1749) 1 W. Bl. 46). The proper judgment in a case of *Quo Warranto* is: that the defendant be ousted of his liberty; in a case of *Sci. Fa.*, that the franchise be seised into the King's hands (*R.* v. *Stanton, ubi sup.*, reported as *R.* v. *Staverton* (1610) Yelv., at p. 192). Forfeiture for non-user may be pronounced, even if an express grant of the franchise can be proved (*Darell* v. *Bridge, ubi sup.*); but not where the charter, though in terms creating a right, in fact imposes a duty for the benefit of the public (*The King* v. *Havering-atte-Bower* (1822) 5 B. & Ald. 691). Misuser or non-user of a franchise does not entitle a private person to disturb it. (*G. E. R.* v. *Goldsmid* (1884) L. R. 9 App. Ca. 927).]

Alienation of franchise

1204. (Semble) A franchise can be devised, assigned, or demised;[a] but it cannot be divided.[b]

(a) *Constable's Case* (1601) 5 Rep. 106 a.
Bays v. *Bird* (1726) 2 P. Wms., at p. 399.
Wills Act, 1837, s. 3.
Neill v. *D. of Devonshire* (1882) L. R. 8 App. Ca. 135.
Goldsmid v. *G. E. R.* (1883) L. R. 9 App. Ca. 927. (The facts are better given in 25 Ch. D. 511.)
A. G. v. *Horner* (1884) 14 Q. B. D. 245.

[The older doctrine was, at least in some cases, that a franchise was not transferable (Brooke, *Abridgment*, Franchise, pl. 38; but the reference to 6 Edw. II cannot be traced); and it was said not to be devisable under the old Statute of Wills, 32 Hen. VIII (1540) c. 1. (See *dicta* in *Mountjoy* v. *Huntington* (1583) Godb. 17.) There

appears to be no doubt, however, that, in modern times, the rule has been the other way; though in the well-known case of the hereditary shrievalty of Westmoreland, a preamble to an Act of Parliament (13 & 14 Vic. (1850) c. 30) expressed official doubts as to the devisability of that office. Doubtless, some franchises are inseparable from the tenements to which they are appurtenant. But, even on this point, it was said by Lord Selborne, C., in *Neill* v. *D. of Devonshire*, *ubi sup.*, at p. 153, that the destruction of a manor to which a free fishery in a tidal river was appurtenant, by alienation of all the manor lands, would not extinguish the fishery, but leave it in gross in the hands of the alienor.]

(b) *Mountjoy* v. *Huntington*, *ubi sup.*, where it was said that there could not even be partition of a franchise.

Hundred

1205. The franchise of a hundred consists in the right to hold a hundred court or wapentake, with its incidents of the appointment of a bailiff of the hundred, return and execution of writs, and perception of fees, fines, and other profits of jurisdiction.[a] A hundred cannot be severed from its county so as to become a franchise at the present day; at any rate as respects the powers and duties of the sheriff.[b]

(a) *Atkyns* v. *Clare* (1671) 1 Ventr., at pp. 403 *et seq.*, *per* Hale, C. B.
Bays v. *Bird* (1726) 2 P. Wms., at p. 399, *per* Lord King, C.

(b) Sheriffs Act, 1887, s. 19 (1). This statute repeals the older legislation on the subject, viz. 2 Edw. III (1328) c. 12, and 14 Edw. III (1340) c. 9.

[The hundred is a very ancient territorial district, coming between the county and the vill or township. From the earliest times it has also been a unit of judicial and police administration, and, as such, a source of revenue to the authority in whose hands it is vested. Though there can be little doubt that, originally, the hundred court was merely a popular assembly ("the suitors are judges" (*Gentleman's Case* (1583) 6 Rep., at 12 a)), yet, after the Conquest, the royal officials strove, on the whole successfully, to establish the

modern theory that all the hundreds in the kingdom belong, in the absence of proof to the contrary, to the Crown (*Anon.* (*temp.* Edw. III) Keilw. 151). Thus the claim by a subject to the profits of a hundred became a 'franchise' in the strict sense; though the frequency with which it was asserted may be gathered, not only from the Hundred Rolls of 1275, but from such cases as *Atkyns* v. *Clare*, *ubi sup.*, where the plaintiff claimed no less than seven of the thirty hundreds in the County of Gloucester. The formal recognition of the franchise consisted in the issue to the sheriff of the writ of Non Intromittas (*ibid.*, at p. 399); but the dangers of this recognition of feudal privilege were checked by the drastic provision of the Statute of Westminster the Second (13 Edw. I (1285) c. 39 (12)) by virtue of which, on any delay of the holder of the franchise to execute the royal process, a writ of Non Omittas might issue to the sheriff, bidding him do the work himself, notwithstanding the franchise. The jurisdictional claims of the owners of hundreds and all similar franchises were still further cut down by statute in 1535 (27 Hen. VIII, c. 24), as well as by the wholesale vesting in the Crown of the franchises belonging to dissolved religious houses. Still, it is clear that the Non Omittas was of practical, or at least technical, value, as late as the nineteenth century (*Carrett* v. *Smallpage* (1808) 9 East, 330; *Adams* v. *Osbaldeston* (1832) 3 B. & Ad. 489); though the gradual abolition by statute of private jurisdictions (e. g. by the Durham (County Palatine) Act of 1836, and the Liberties Acts of the same year and the year 1850) has tended to make the subject more and more of historical interest only. Nevertheless, express provision is made in a modern statute (Sheriffs Act, 1887, s. 34) for the conflicting powers of sheriff and lord of a hundred. The ancient civil jurisdiction of the hundred, though never formally abolished, has been, save in exceptional cases like that of Salford, practically destroyed by the effective rivalry of the modern statutory County Courts; but the possibility of its existence is still officially recognized (County Courts Act, 1888, s. 6). The administrative functions of all liberties and franchises are now vested in the county councils (Local Government Act, 1888, s. 48). The constitutional position of hundreds and other territorial franchises with regard to parliamentary elections does not fall within the scope of this work. Like the hundred, though more rarely, the greater jurisdiction of the county may have been at one time in private hands. But the last of the hereditary shrievalties was abolished in 1850 (13 & 14 Vic. c. 30); and it is long since a county palatine was vested in a subject as property.]

1206. By the grant (? devise) of a 'hundred,' land belonging to the grantor (or testator) within the territory of the hundred does not pass; but only the franchise of the hundred. *Conveyance of 'hundred'*

Bays v. *Bird* (1726) 2 P. Wms. 397.

1207. The lord of a hundred is not entitled, as such, to issue a deputation appointing a gamekeeper under the provisions of the Game Act, 1831, s. 14. *Deputation*

E. of Ailesbury v. *Pattison* (1778) 1 Dougl. 28 (decided on the corresponding section of the 22 & 23 Car. II (1670) c. 25 (s. 2)). The right belongs to the lord of a manor (*post*, § 1209).

1208. A leet is a franchise consisting of the right to hold a court of record for view of frankpledge and for the amercement of petty criminal offences, especially of breaches of the assize of bread and ale (but not of modern statutes creating similar offences), and to appoint ale-conners, burley-men, and other officials for executing the franchise. It is usually, but not necessarily, appendant to a hundred. *Leet*

Coke, 4 Inst. cap. 54.
Statute for View of Frankpledge (18 Edw. II (1325)).
8 Edw. IV (1472) c. 8.
Case of the Hundred of C. (1497) Y. B. 12 Hen. VII, Pasch. pl. 1.
D. of Bedford v. *Alcock* (1749) 1 Wils. 248.
Colebrook v. *Elliott* (1766) 3 Burr. 1859.

[Even in Coke's day (see *op. cit.*), the origin and scope of this ancient Court were much in dispute; but the better opinion is, that

it was in some way derived from the sheriff's tourn or semi-annual visitation of the hundred courts in his county, made (*inter alia*) for the purpose of seeing that the tithings were full (Magna Carta (1225) c. 35). If this view be correct, the doctrine which connects the leet with the hundred would seem to be well founded. The existence of the leet is recognized by statute so late as 1757 (31 Geo. II, c. 29, s. 43). The view of frank-pledge was a police function consisting of the duty of seeing that the tithings or securities for good behaviour created or legalized by the Ordinance of the Hundred were duly enrolled (Magna Carta, *ubi sup.*). The assize of bread and ale was a schedule of prices and qualities of those articles annually fixed under the system laid down in 1266 (51 Hen. III, st. I). Both institutions have long since disappeared; and the leet is of little, if any, practical importance at the present day. Consequently, it is unnecessary to do more than to refer to the decisions which have held, in comparatively modern times, (a) that an amercement at a leet for a private injury done to the lord is illegal, in spite of custom (*Wood* v. *Lovatt* (1796) 6 T. R. 511) and (b) that a custom to compel residents within the franchise to be sworn at one court and to make their presentments at the next, is likewise bad (*Davidson* v. *Moscrop* (1801) 2 East, 56).]

Manor

1209. A manor is a seignory or lordship, held along with demesne lands (*ante*, § 1089 n), over estates of freehold tenure, to which is incident a right to hold a court or courts for the tenants of such estates and of copyhold estates of the manor, if any (*post*, § 1211).[a] The soil of the waste of the manor (if any) is deemed, in the absence of proof to the contrary, to be vested in the lord of the manor, subject to the rights of the tenants of the manor.[b]

(a) Co. Litt. 57 b, 58 a.

(b) *E. of Dunraven* v. *Williams* (1836) 7 C. & P., at p. 332, *per* Coleridge, J.
Gery v. *Redman* (1875) 1 Q. B. D. 161.

1210. In addition to the incidents of forfeiture, escheat, heriots, fines, and other profits described in Title V (*ante*), the lord of a manor has, as such, the following rights, viz.: *Manorial rights*

(i) the right, as against the freehold tenants of the manor and strangers lawfully claiming rights of pasture thereon, to enclose or approve for his own benefit any portion of the waste lands of the manor; provided that he leaves sufficient pasture to satisfy such lawful claims.[a] But such right of enclosure or approval cannot be exercised without the consent of the Board of Agriculture.[b] No erection of a windmill, sheep-cote, dairy, or enlarging of a court necessary, or curtilage, will be deemed to prejudice a right of common of pasture;[c]

(a) Statute of Merton (20 Hen. III (1235)) c. 4.
Statute of Westminster II (13 Edw. I (1285)) c. 46.
(b) Law of Commons Amendment Act, 1893, s. 2.
(c) Statute of Westminster II, *ubi sup.*

[By various statutes of the 18th and 19th centuries, of which the most important was the Inclosure Act, 1845, provision was made for obtaining Parliamentary sanction to the enclosure and allotment in severalty of manorial wastes; but later legislation (e. g. the law of Commons Amendment Act, 1893, s. 2, and the Commons Act, 1899, s. 22), whilst not formally repealing this provision, has rendered it virtually obsolete.]

(ii) the right to appoint and depute a gamekeeper for the manor, or any division or

district thereof, and to authorize him to kill game therein;

Game Act, 1831, s. 14.

[This right is not affected by the Game Licenses Act, 1860, ss. 6–8.]

(iii) the right to erect a dovecote on his land within the manor.

Bowlston v. *Hardy* (1597) Cro. Eliz., at p. 548.

[The owner of a 'reputed' manor (*ante*, § 1089, n.) is presumed to have the same franchises as the lord of a legal manor (*Soane* v. *Ireland* (1808) 10 East, 259).]

Conveyance of 'manor'

1211. A conveyance of a legal manor will pass the demesne lands and the soil of the waste; but by the conveyance of a reputed manor nothing but the franchise rights, if any, will pass without express words.

Darell v. *Wybarne* (1560) 2 Dyer, 207 b, *per* Dyer, C. J.
Doe dem. Clayton v. *Williams* (1843) 11 M. & W. 803.
A. G. v. *Ewelme Hospital* (1853) 17 Beav., at p. 386, *per* Lord Romilly, M. R.

[So far as conveyances coming into operation after 1881 are concerned, this doctrine seems to have been modified, if not overruled, by s. 6 of the Conveyancing Act, 1881, which enacts (s. 2) that a conveyance *inter vivos* of a manor or reputed manor shall be deemed to include all hereditaments appertaining or deemed or reputed to appertain thereto.]

Separation of demesnes

1212. If the lord of a manor conveys away any part of his demesne lands in fee simple, such lands

cease to be parcel of the manor;[a] and, if they become re-united in such lord by re-purchase, they do not again become parcel of the manor.[b]

(a) *Sir Moyle Finch's Case* (1606) 6 Rep. 63 a.
Chetwode v. *Crew* (1746) Willes, 614.
(b) *Delacherois* v. *Delacherois* (1864) 11 H. L. C. 62.

Court baron

1213. A court baron is a franchise which entitles the lord of a manor in whom it is vested to hold a court for his tenants; provided that there are at least two freehold tenants of the manor. Such franchise is presumed to be appendant to every manor.

Jentleman's Case (1583) 6 Rep. 11 b.
Rumsey v. *Walton* (1760) } 4 T. R. 444.
Bradshaw v. *Lawton* (1791) }

[As in the hundred court, so in the court baron, "the free suitors are judges"; but the steward is an integral part of the court, and therefore a judicial officer (*Holroyd* v. *Breare* (1819) 2 B. & Ald. 473). The primary business of the court baron is to keep the records relating to the copyhold tenements of the manor, and to adjudicate upon disputes between tenants as to title. But the latter function was, despite Magna Carta (c. 34), practically abolished, so far as freehold tenants were concerned, before the end of the thirteenth century, by the fictions employed in the process of the Writ of Right, and by the Writs of Entry. On the other hand, the court baron appears, at least in some cases, to have acquired by special grant or prescription a good deal of miscellaneous civil jurisdiction, e. g. holding pleas of debt, and granting, and even trying, replevins (*Hellawell* v. *Eastwood* (1851) 6 Exch. 295). This jurisdiction has, however, disappeared since the establishment of the modern County Courts; and provision has been made for its formal extinction (County Courts Act, 1888, s. 6). Legal theory now distinguishes two manorial courts, viz. the court baron for the freeholders, and the court customary for the copyholders. But the court customary is not treated as a franchise.]

Goods of outlaws

1214. The right to the goods of outlaws is a franchise which entitles the person in whom it is vested to the corporeal chattels movable (but not to the leaseholds or choses in action) of persons coming within the scope of the franchise who are outlawed on criminal process.

R. v. *Sutton* (1670) 1 Saund. 273.
The King v. *Capper* (1817) 5 Price, 217.

[Before 1870, the franchise frequently included the forfeitures of felons; but the forfeiture Act, 1870, s. 1, abolished forfeiture for conviction of treason and felony, and the Civil Procedure Acts Repeal Act, 1879, s. 3, abolished outlawry on civil process.]

Fairs and markets

1215. A fair or market is a franchise entitling the person in whom it is vested, to the sole and exclusive right to hold, within the local limits of the franchise, at the place named in the grant, or, if no place is named, at any convenient place,[a] a fair or market, or both (as the case may be), and to demand such tolls for the use thereof as may be permitted by the grant, from the persons resorting to such fair or market.[b] A grant of a fair or market implies a grant of a right to hold a court of pie-powders.[c]

(a) *Dixon* v. *Robinson* (1686) 3 Mod. 107.
Curwen v. *Salkeld* (1803) 3 East, 538.
(b) Outrageous toll is a cause of forfeiture by the Statute of Westminster the First (3 Edw. I (1275) c. 31).
(c) 17 Edw. IV (1477) c. 2; made perpetual by 1 Ric. III (1483) c. 1 (2).

4 Inst. c. 60 (where the jurisdiction of the court is described).
Howel v. *Johns* (1600) Cro. Eliz. 773.
Goodson v. *Duffield* (1612) Moo. 830.

[There seems to be no legal distinction between a market and a fair; though, doubtless, in popular idea, the latter suggests something in the nature of a holiday, and it has been judicially held, though by an evenly divided Court, that a fair can exist without buying and selling (*Collins* v. *Cooper* (1893) 17 Cox, 647). See, however, the *dictum* of Coke (2 Inst. 406), and *D. of Newcastle* v. *Worksop* [1902] 2 Ch., at p. 155.]

Site of market

1216. The lord of a market may, in the absence of special circumstances, move the site of the market place from one spot to another within the local limits of the franchise;[a] provided that the new site is equally convenient to the persons resorting to the market.[b]

(a) *Curwen* v. *Salkeld* (1803) 3 East, 538.
The King v. *Cotterill* (1827) 1 B. & Ald. 67.
(b) *R.* v. *Starkey* (1837) 7 A. & E. 95.

[The precise site of the market place may be prescribed in the charter "by metes and bounds"; and then, of course, no variation is possible. But such a restriction will not be presumed in a prescriptive market (*Gingell* v. *Stepney Borough Council* [1908] 1 K. B. 115).]

No monopoly

1217. The grant of a market does not of itself entitle the grantee to prohibit the sale of tollable articles in private shops within the limits of the franchise during market hours;[a] but such a right may be acquired by prescription.[b]

(a) *Mayor of Macclesfield* v. *Chapman* (1843) 12 M. & W. 18.
(b) *Mosley* v. *Walker* (1827) 7 B. & C. 40.
Mayor of Macclesfield v. *Pedley* (1833) 4 B. & Ad. 397.
Mayor of Penryn v. *Best* (1878) 3 Ex. D. 292.

Tolls

1218. A grant of a market does not of itself entitle the grantee to levy tolls for the use of the market;[a] but such a right may be derived from indirect expressions in the grant or from prescriptive usage.[b]

(a) *Heddy* v. *Wheelhouse* (1596) Cro. Eliz. 558.
Earl of Egremont v. *Saul* (1837) 6 A. & E. 924.
D. of Newcastle v. *Worksop* [1902] 2 Ch. 145.
(b) *Earl of Egremont* v. *Saul, ubi sup.*
Lawrence v. *Hitch* (1868) L. R. 3 Q. B. 521.

[The precise amount of the tolls need not be fixed by the charter. A grant of 'reasonable' toll is good (*Lawrence* v. *Hitch*, *ubi sup.*). Tolls must be carefully distinguished from stallage and pickage. Tolls are in the nature of dues for the use of the market; stallage and pickage are in the nature of rents for the occupation of specific plots of ground, and can, therefore, only be claimed by the owner of the soil (*R.* v. *Burdett* (1696) 1 Ld. Raym. 148). There was at one time a theory that all tenants in ancient demesne (*ante*, Tit. V, § 1117 n.) had certain privileges of exemption from tolls in all or some markets (2 Inst. 229; *Case of the Town of Leicester* (1586) 2 Leon. 190). But it is doubtful if such a privilege could now be enforced.]

Disturbance of market

1219. Any act which amounts to a rival claim to conduct the process of selling, to the prejudice of the market, within the local limits of a market franchise, or to take the benefit of the market without paying the proper dues, whether done within the market place or not, is a disturbance of the market.

Bailiff of Tewkesbury v. *Bricknell* (1809) 2 Taunt. 120.
Bridgland v. *Shapter* (1839) 5 M. & W. 375.
Mayor of Brecon v. *Edwards* (1862) 1 H. & C. 51.
Goldsmid v. *G. E. R.* (1883) 25 Ch. D., at p. 548, *per* Lindley, L. J.
Wilcox v. *Steel* [1904] 1 Ch. 212.

[Needless to say, acts aiming more directly at destruction of the franchise, such as claiming to have a rival franchise, or creating an affray or riot with the object of preventing resort to the market, would equally amount to a disturbance. Many of the more important markets are at the present day governed by the provisions of the Markets and Fairs Clauses Act, 1847, and its amendments, which (*inter alia*) impose summary penalties for certain disturbances of their privileges. *Quære:* where the market in question is an entirely new market, created under the Act, are these new penalties in addition to, or substitution for, the common law action? (*Stevens* v. *Chown* [1901] 1 Ch. 894).]

Ferry

1220. A ferry is the exclusive right of transporting, for hire or reward, passengers or goods, or both (as the case may be), within a certain area, across a river or arm of the sea, by means of a boat or other moveable structure.[a] Such ferry may be either from vill to vill, or from highway to highway.[b]

(a) *Tripp* v. *Frank* (1792) 4 T. R. 666 (arm of the sea).
Huzzey v. *Field* (1835) 2 C. M. & R., at p. 442, *per* Lord Abinger, C. B. (arm of the sea).
Newton v. *Cubitt* (1862) 12 C. B. N. S., at p. 58, *per* Willes, J. (river).
(b) *Cowes* v. *Southampton, &c.* [1905] 2 K. B. 287 (arm of the sea).

1221. No act is a disturbance of a ferry, unless in substance it merely provides an alternative route

between the *termini* of the ferry.[a] The building of a bridge is not a disturbance of a ferry; even though it clearly diverts traffic from the ferry.[b]

(a) *Tripp* v. *Frank, ubi sup.*
Huzzey v. *Field, ubi sup.*
Newton v. *Cubitt, ubi sup.* (confd. on appeal, 13 C. B. N. S. 864).
Hopkins v. *G. N. R. Co.* (1877) 2 Q. B. D. 224.
Cowes v. *Southampton, &c., ubi sup.*

[These cases go to show that the owner of a ferry cannot claim to compel the public to use his ferry when a more convenient route is open to them.]

(b) *Hopkins* v. *G. N. R. Co., ubi sup.*
Dibdin v. *Skirrow* [1908] 1 Ch. 41.

[Overruling *dictum* of Blackburn, J., in *Reg.* v. *Cambrian Ry. Co.* (1871) L. R. 6 Q. B., at p. 430. In both the cases above quoted, the building of the bridge provided for traffic which could not have made use of the ferry. *Quære:* Was this an essential point in the defence?]

Bridge instead of ferry

1222. The owner of a ferry is not allowed to substitute a bridge for the ferry. But such an act is a public nuisance; and a person bringing an action in respect of it must prove special damage (*ante*, § 832).

Paine v. *Partrich* (1690) Carth. 191.

Tolls

1223. A toll thorough is a right to demand a sum certain in respect of each passenger or chattel passing along a public highway (including a bridge and a

navigable river) between certain points.[a] A toll traverse is a right to demand a sum certain in respect of each passenger or chattel passing across the plaintiff's land.[b] Subject to § 1201, a right of toll may be acquired by royal grant or prescription.

(a) *Smith* v. *Shepherd* (1598) Cro. Eliz. 710, overruling the *dictum* of Thorp, J., in Y. B. (1348) 22 Ass. pl. 58, and also ruling that, notwithstanding c. 15 of the Statute of Marlbridge (1267), distress for the toll might be taken in the highway itself.
Steinson v. *Heath* (1693) 3 Lev. 400.
Vinkinstone v. *Ebden* (1697) Carth. 357.
Walgham v. *Key* (1766) 2 Wils. 296.

(b) *Anon.* (*temp.* Edw. III) Keilw. 152.
Anon. Y. B. (1489) 5 Hen. VII, Mich. pl. 22, *per* Fairfax, J.
James v. *Johnson* (1677) 1 Mod. 231.
Pelham v. *Pickersgill* (1787) 1 T. R. 660.

[A few other rights of a similar character are recognized by English law, e. g. for compulsory user of a mill, for which an appropriate writ (*Secta ad Molendinum*) existed in the Register (*Hix* v. *Gardiner* (1614) 2 Bulstr. 195), and for compulsory user of a common bakehouse (*Farmour* v. *Brook* (1590) reported under last case). A "turn toll" was mentioned, but not defined, in *Jehu Webb's Case* (1608) 8 Rep., at 46 b. It is said to be a toll taken in respect of each beast that goes to market and returns unsold across the claimant's land. If this view is correct, it would be merely a species of toll traverse.]

Treasure trove

1224. The franchise of treasure trove is the right to any articles of gold or silver (including money), which have been concealed in land within the limits of the franchise, when the owner of such articles cannot be discovered.

3 Inst. cap. 58.
A. G. v. *British Museum* [1903] 2 Ch. 598.

Waif

1225. The franchise of 'waif' is the right to stolen goods abandoned by the thief flying on a charge of felony within the limits of the franchise.[a] If the owner of the goods assists promptly in bringing the accused to justice, he can recover his goods from the lord of the franchise, and damages for any injury thereto by such lord.[b]

(a) *Davies' Case* (1598) Cro. Eliz. 611.
Foxley's Case (1601) 5 Rep. 109 a.
(b) *Rooke* v. *Dennis* (1586) 2 Leon. 192.

['Waif' does not give a claim to the goods of the felon himself, though there may be a separate claim to such goods, or at any rate there might have been, before the passing of the Forfeiture Act, 1870 (*Foxley's Case*, *ubi sup.*). It seems to have been assumed (Y. B. (1473) 13 Edw. IV Pasch. pl. 5; *The King v. Hanger* (1614) 3 Bulstr., at p. 10, *per* Haughton, J.) that the *Carta Mercatoria* of 1303 (printed in Hall, *History of the Customs Revenue*, Part I, p. 202) exempted the goods of alien merchants from being claimed as waifs.)]

Stray

1226. The franchise of 'stray' is the right to seize any tame beast found wandering unlawfully without apparent owner within the limits of the franchise.[a] The owner of such beast has a right to reclaim it upon tender of reasonable expenses at any time within a year and a day of the proclamation of seizure;[b] but, failing such claim, it then becomes the property of the lord of the franchise.[c]

(a) Bl. *Comm.* I, 297.

[Dogs cannot be claimed as strays (Bl. *Comm.*, *ubi sup.*, at p. 298); and no fowl can be a stray except a swan (4 Inst. 280).]

(b) *Taylor* v. *James* (1607) Godb. 150.
(c) *Constable's Case* (1601) 5 Rep., at 108 b.
Anon. (n. d.) 12 Rep. 101.

[Before this time the lord of the franchise acquires no property; and so, if the beast escapes and falls into the hands of the lord of another franchise, the lord of the first franchise has no remedy (*Harvie* v. *Blacklole* (1610) Brownl. 236). But if his possession is interfered with, he can sue in Trespass (*Dalton* v. *Barnard* (1618 Cro. Jac. 520).]

Rights of franchiser

1227. The lord of a franchise who has seized a beast as stray may not, until he becomes the owner, work or injure it;[a] but (*semble*) he may milk a stray cow without being accountable for the value of the milk.[b]

(a) *Bagshawe* v. *Goward* (1604) Cro. Jac. 147.
Harvie v. *Blacklole* (1610) Brownl. 236.
Pleadal v. *Gosmore* (1625) Winch, 124.

[And the seizer is a trespasser *ab initio* if he does (*Bagshawe* v. *Goward*, *ubi sup.*).]

(b) *Bagshawe* v. *Goward*, *ubi sup.*, at p. 148.

[There seems at one time to have been great doubt on this point (see the cases quoted in 12 Rep. 101). But the doubt appears to have arisen from a confusion between a stray and a distress.]

Wreck

1228. The franchise of 'wreck' is the right to such goods as are cast or left on land within the limits of the franchise by the action of the sea, as the result of the loss of a ship; the owner being unknown.

Such a right may be claimed by royal grant or prescription.

Constable's Case (1601) 5 Rep. 106.
Wiggan v. *Brantbwaite* (1699) 12 Mod. 259.
Hamilton v. *Davis* (1771) 5 Burr. 2732.
The King v. *Forty Nine Casks of Brandy* (1836) 3 Hagg. Adm. 257.

[Wreck includes (a) *flotsam*, or goods which have floated away on the sinking of a ship, (b) *jetsam*, or goods thrown overboard to lighten a ship, and (c) *ligan*, or goods so thrown over and marked by a floating buoy or cork; and a grant of wreck will pass all three (*Constable's Case*, *ubi sup.*, at 106 b). Probably the Statute of Westminster I (1275), c. 4, which provided that where a man, a dog, or a cat escaped alive, nothing should be adjudged wreck, was merely explanatory of the common law. But, even if there has been a complete wreck, the owner may assert his claim (*Hamilton* v. *Davis*, *ubi sup.*). Derelict goods found floating are not wreck, but droits of admiralty (*The King* v. *Forty Nine Casks of Brandy*, *ubi sup.*). A claim, in the nature of salvage, to have an anchor and cable from any vessel cast ashore within a franchise, though not a wreck, was, after hesitation (*Geere* v. *Burkensham* (1682) 3 Lev. 85) ultimately allowed (*Simpson* v. *Bithwood* (1691) *ibid.*, 307). The owner of goods claimed as wreck has a year and a day from the seizure in which to make his claim (*Constable's Case*, *ubi sup.*, at 108 a).]

Free fishery

1229. A free fishery is the exclusive right of fishing in a tidal river or an arm of the sea.[a] It has not been lawful to create such a right, except under the provisions of an Act of Parliament, since the 6th July, 1189.[b]

(a) *Carter* v. *Murcot* (1768) 4 Burr. 2162.
D. of Somerset v. *Fogwell* (1826) 5 B. & C. 875.

[Unless a free fishery can be established, the right of fishing in tidal waters belongs to the public generally; but the mere fact that a river is navigable does not give the public a right to fish. It is only the soil covered by the flow of the tide which is vested in the Crown, and, therefore, only over such soil that a free fishery could

have been granted (*Smith* v. *Andrews* [1891] 2 Ch. 678, and authorities there cited).]

(b) Magna Carta, 9 Hen. III (1225) c. 16.
Weld v. *Hornby* (1806) 7 East, 195.

[There has been a good deal of inconsistency in the use of terms to denote fishing rights; but it is fairly clear that three distinct kinds are recognized by English law. The first is that styled a "free fishery" in this work, viz. a franchise, which must be claimed, if at all, as granted before 1189, and which consists in the exclusive right of fishing in tidal water. The second, which in this work will be called a "several fishery" (*post*, § 1261), is the exclusive right of fishing, whether as a profit *à prendre*, or a mere right of ownership, in private water. The third, in this work styled "common of piscary" (*post*, § 1263), is a true *jus in alieno solo*, exerciseable by two or more persons in common in private water. It will be observed that both the first and second are exclusive rights; and there has long been a controversy as to whether their owner could bring Trespass for interference with them, or was confined to an action of Case for disturbance (see *Upton* v. *Dawkin* (1686) 3 Mod. 97; *Smith* v. *Kemp* (1693) Carth. 285). This controversy is really based on a deeper doubt, viz. as to whether the grant of an exclusive fishery passes the property in the soil. As to this point (which will be discussed later) see *Marshall* v. *Ulleswater Steam Navigation Co.* (1863) 3 B. & S. 732; but the presumption appears now to be clearly in the affirmative, even for a free fishery in tidal waters (*A. G.* v. *Emerson* [1891] A. C. 649). The owner of a several fishery in private water has, probably, one advantage which the owner of a free fishery in a tidal river has not, viz. the right to seize, as damage feasants, the boats, gear, and tackle of poachers (*Reynell* v. *Champernoon* (1631) Cro. Car. 228). But, if a casual expression by Hale, C. J. (*Lord Fitzwalter's Case* (1674) 1 Mod. 105) may be trusted, Trespass may be brought in respect of a free fishery as defined above.]

Inland lake

1230. The public have no rights of fishing in an inland lake, however large, not being an arm of the sea, nor in running water forming a non-tidal river;

nor could the Crown, by virtue of the prerogative, at any time have granted a free fishery therein.

Bristow v. *Cormican* (1878) L. R. 3 App. Ca. 641 (overruling the doubt expressed in *Marshall* v. *Ulleswater Co.*, *ubi sup.*, at p. 742). *Johnson* v. *O'Neill* [1911] A. C. 552.

Change of tidal river

1231. If a tidal river totally changes its course, whether by slow degrees or suddenly, no right of free fishery which may have existed in respect of the deserted bed is transferred to the new channel.

Mayor of Carlisle v. *Graham* (1869) L. R. 4 Ex. 361.

Royal fish

1232. The franchise of royal fish is the right to such sturgeons, grampuses, whales, porpoises, dolphins, riggs, and graspes, and generally whatsoever other fish have in themselves great and immense size or fat, as may be cast up or driven ashore within the limits of the franchise.

Constable's Case (1601) 5 Rep. 107 a.
Cinque Ports v. *The King* (1831) 2 Hagg. Adm. 438.

Free warren

1233. A free warren is the right to harbour and take hares, rabbits, pheasants, partridges, and other similar beasts and birds, in their wild state, for purposes of sport, within the limits of the franchise, and to appoint a warrener to protect such game.[a] Such

franchise may be claimed over the land of the claimant, or, by prescription, over the land of another person.[b] Free warren is not an essential feature of a manor.[c]

(a) Co. Litt. 233 a.
Wadhurst v. *Damme* (1604) Cro. Jac. 44.
Rice v. *Wiseman* (1615) 3 Bulstr. 82, *per* Dodderidge, J.
E. Beauchamp v. *Winn* (1873) L. R. 6 H. L. C., at p. 239, *per* Lord Chelmsford, C.
(b) *Anon.* (1537) Dyer, 30 b.
A. G. v. *Parsons* (1832) 2 Cr. & J., at p. 302, *per* Lord Lyndhurst, C. B.
(c) *Bowlston* v. *Hardy* (1597) Cro. Eliz. 547.
Morris v. *Dimes* (1834) 1 A. & E. 654.

[And, therefore, a right of free warren will not pass by a conveyance of a manor, even "with the appurtenances"; unless it is strictly appurtenant to the manor (*Bowlston* v. *Hardy*, *ubi sup.*).]

Conveyance of free warren

1234. By the grant (or devise) of a "free warren" (with or without description of the game therein), the ownership of the soil does not, in the absence of expression to the contrary, pass to the grantee (or devisee).

E. Beauchamp v. *Winn*, *ubi sup.* (overruling on this point the *dicta* in *Rice* v. *Wiseman*, *ubi sup.*).

Property in animals

1235. (*Semble*) The lord of a franchise of warren has a 'qualified property' in the beasts and fowls within the warren; and can bring the action of Trover against any one who starts any of such beasts

or fowls in the warren, and converts them to his own use within or without the warren.

Bl. *Comm.* II, 419.
Sutton v. *Moody* (1697) 1 Lord Raym. 250, *per* Holt, C. J. (referred to with approval in *Blades* v. *Higgs* (1865) 11 H. L. C., at p. 633).

NOTE

[In addition to the franchises dealt with above, there are a few instances, e. g. forest, chase, and park, which have a theoretical existence; but, apart from the rights of the Crown (which do not form part of the subject matter of this work) are of little (if any) practical importance. It has not, therefore, been deemed necessary to set them out in detail. For particulars, the enquirer may be referred to Manwood's classical *Treatise of the Lawes of the Forest*, first published in 1598, and to Mr. G. J. Turner's admirable *Select Pleas of the Forest* (Selden Society's Publications, Vol. XIII).]

Immunities

1236. The Crown at the time of granting a franchise, and the lord of a franchise at any time, may exempt from the operation of the franchise any person or class of persons. Such an immunity may be proved by express grant or long usage.

The King v. *Hanger* (1614) 3 Bulstr. 1.
Cocksedge v. *Fanshawe* (1779) 1 Doug. 119; 3 Bro. P. C. 703.
Lockwood v. *Wood* (1841) 6 Q. B. 31.
Goodman v. *Mayor, &c. of Saltash* (1882) L. R. 7 App. Ca. at p. 642, *per* Lord Selborne, C.

EASEMENTS

Easement

1237. An easement is a right, of a definite and limited character,[a] annexed to the enjoyment of a corporeal or incorporeal hereditament ("dominant

tenement"),[b] by reason whereof the occupier of another corporeal hereditament ("servient tenement") is bound to permit the person in whom the right is for the time being vested to do something on, in, or over the servient tenement, other than taking corporeal substance,[c] or whereby the owner or occupier of the servient tenement is bound to abstain from exercising one or more of the ordinary rights of ownership or occupation, or, in rare cases, to do something, for the benefit of the occupier of the dominant tenement.[d] Easements recognized by English law are rights of way and water, rights of light and air, rights of support, rights of affixing chattels to land or buildings, and rights to the maintenance of fences.

(a) *Hewlins* v. *Shippam* (1826) 5 B. & C., at p. 229, *per* Bayly, J., quoting with approval *Termes de la Ley.*

(b) *Rangeley* v. *M. R. Co.* (1868) L. R. 3 Ch. App. 306 (and see *ante*, § 12, note).
Hanbury v. *Jenkins* [1901] 2 Ch. 401. (Could an easement be appurtenant to another easement? See *A. G.* v. *Copeland* [1901] 2 K. B., at p. 106.)

(c) For this purpose, water is not deemed to be a corporeal substance.

(d) *Pomfret* v. *Ricroft* (1669) 1 Wms. Saund., at p. 322, *per* Twysden, J.
Star v. *Rookesby* (1710) 1 Salk. 335.

[True easements, and, to a certain extent, even profits *à prendre*, must be carefully distinguished, not only from customary rights (*ante*, § 1197, n., and *post*, Tit. XII), but also from simple licenses and so-called "natural rights of property." Licenses are, properly speaking, mere permissions, and of themselves create no interest in land; though they may be coupled with such an interest (*Wood* v. *Leadbitter* (1845) 13 M. & W. 838). So-called "natural rights of property," such as the right of a riparian proprietor to use water flowing past or over his land, the right to dig in one's own soil, etc., are merely incidents of the larger rights of ownership or occupation;

and, though they bear some superficial resemblance to true easements, they are readily distinguishable from them. Thus, in the case of a so-called "natural right" (1) the existence of the right is presumed, and the *onus* lies on the person who denies it (*Portsmouth Waterworks Co.* v. *L. B. & S. C. Ry.* (1909) XXVI T. L. R., at p. 175, *per* Parker, J.) and (2) it is not extinguished by unity of possession or abandonment (*Sury* v. *Pigot* (1626) Poph. 166; *Wood* v. *Waud* (1849) 3 Exch. 775), though, of course, a recognized easement may be acquired by prescription which renders exercise of the natural right impossible. It is also important to remember, that an easement exists for the benefit of the dominant tenement; and that, therefore, the exercise of it cannot, by any length of user, give rise to a counter-easement for the benefit of the owner of adjoining land who has, in fact, profited by it (*Arkwright* v. *Gell* (1839) 5 M. & W. 203; *Wood* v. *Waud*, *ubi sup.*; *Mason* v. *Shrewsbury Co.* (1871) L. R. 6 Q. B. 578).]

Way

1238. A right of way is a right of passing on, through, or over [a] a servient tenement, from a given point to a given point,[b] for a definite purpose or for all purposes.[c] Such a right of passage may be exerciseable by means of vehicles ("cart," "carriage," or "wagon way"), horses or other animals ("bridle," "horse," "pack," or "drift way"), or on foot only ("foot way").[d]

(a) An underground right of way is familiar in practice, in connection with mining leases, and may be lateral or vertical. It is usually called a "way-leave" (*Dand* v. *Kingscote* (1840) 9 L. J. Ex. 279). A claim to right of aerial way has not yet, it is believed, come before the Courts. But there seems no reason to doubt that such a right would be possible.

(b) This, at any rate, was the old doctrine (*Alban* v. *Brounsall* (1609) Yelv. 163; *Rouse* v. *Bardin* (1790) 1 H. Bl. 353, *per* Wilson, J.). But it seems to have been held in recent years, that if the *termini* are ascertained, it is immaterial that the track is undefined; though the right to define it, in the absence of prescription, probably belongs to the grantor (*Deacon* v. *S. E. R. Co.* (1889) 61

L. T. 377). This modern doctrine has, however, been questioned in a recent case by Vaughan Williams, L. J. (see *Metr. Ry. Co.* v. *G. W. R. Co.* (1901) 84 L. T., at p. 340).

(c) *United Land Co.* v. *G. E. R. Co.* (1875) L. R. 10 Ch. App., at p. 590, *per* Mellish, L. J.
Sketchley v. *Berger* (1894) 69 L. T. 754.

(d) Co. Litt. 56 a.

To the rights of way enumerated in the text may perhaps be added that of a "smoke way," i. e. the right to pass smoke through one's neighbour's chimneys (*Jones* v. *Pritchard* [1909] 8 Ch. 630). It is a disturbance of an ordinary right of way to lock a gate through which the owner of the right of way must pass to exercise it; even though the person locking it offers to supply a key to the owner of the right of way (*Guests' Estates* v. *Milner's Safes* (1911) XXVIII T. L. R. 59).

Cart way

1239. A "cart" or "waggon" or "carriage" way entitles the person in whom it is vested to the passage of all vehicles drawn by horses or other animals;[a] but not to the passage of unharnessed animals,[b] nor of foot passengers.[c]

(a) Even here, however, the exercise of the right may be restricted, expressly or by implication, to specific purposes (*Cowling* v. *Higginson* (1838) 4 M. & W. 245).

(b) *Ballard* v. *Byson* (1808) 1 Taunt. 279.

(c) *Hingham* v. *Rabett* (1839) 5 Bing. N. C. 623.

[*Quære:* Does such a way authorize the passage of motor vehicles or bicycles? It does not authorize the laying of rails (*Bidder* v. *North Staffordshire Ry. Co.* (1878) 4 Q. B. D. 412).]

Bridle, drift, and foot way

1240. Neither a "bridle" way, nor a "drift" way, nor a "foot" way, entitles the person in whom it is

vested to use hand carts for conveying articles along the way.

Brunton v. *Hall* (1841) 1 Q. B. 792.

Extent of right

1241. In the case of a claim of way under an express grant, it is a question of construction for the Court,[a] and in a claim by prescription or other implied grant, a question of fact for the jury in each case,[b] whether the right of user of the way is limited by the needs of the occupants of the dominant tenement at the date of the inception or presumed inception of the right, or whether such right is sufficiently extensive to cover subsequent requirements. But a complete change in the character or size of the dominant tenement destroys, or at least suspends, the exercise of the right of way.[c]

(a) *Dand* v. *Kingscote* (1840) 9 L. J. Ex. 279.
Allan v. *Gomme* (1840) 11 A. & E. 759.
Henning v. *Burnet* (1852) 8 Exch. 187.
Williams v. *James* (1867) L. R. 2 C. P., at p. 581, *per* Willes, J.
G. W. Ry. Co. v. *Talbot* [1902] 2 Ch. 759.

[The test is what may fairly be taken to have been contemplated at the time of the grant (*G. W. Ry. Co.* v. *Talbot*, *ubi sup.* at p. 767).]

(b) *Williams* v. *James* (1867) L. R. 2 C. P. 577.
(c) *Allan* v. *Gomme*, *ubi sup.*
Wimbledon Conservators v. *Dixon* (1875) 1 Ch. D. 362.
Corporation of London v. *Riggs* (1880) 13 Ch. D. 798 ("way of necessity").
Harris v. *Flower* (1905) 74 L. J. Ch. 127.
Milner's Safe Co. v. *G. N. R. Co.* [1907] 1 Ch. 208.

[Unless, of course, the grant were general in its character, when the way could be used for all purposes (*South Metropolitan Cemetery Co.* v. *Eden* (1855) 16 C. B. 42).]

Repair of way

1242. The person claiming the right of way is entitled, but (*semble*) not compellable, to repair the way. The occupier of the servient tenement is not (in the absence of agreement) compellable to repair the way; and the person claiming the right of way cannot justify trespassing on adjacent land belonging to him, on the ground that the way was out of repair.

Pomfret v. *Ricroft* (1669) 1 Wms. Saund., at p. 322, *per* Twysden, J.
Taylor v. *Whitehead* (1781) 2 Dougl. 745.
Jones v. *Pritchard* [1908] 1 Ch., at p. 638, *per* Parker, J.

[But the owner of the servient tenement may be bound by express covenant or prescription to repair; and then, if he does not, a trespass may be justified (*Henn's Case* (1632) W. Jones, 297), as it is in cases of actual obstruction by the servient owner (*Selby* v. *Nettlefold* (1873) L. R. 9 Ch. App. 111).]

Water

1243. Easements of water recognized by English law are (i) the right to draw water from a natural or artificial stream, spring, or pond,[a] (ii) the right to the uninterrupted flow of water in an artificial stream past or over the claimant's land,[b] (iii) the right to discharge water on to a servient tenement,[c] (iv) the right to divert or foul a natural stream or artificial watercourse,[d] (v) the right to have water flow in

a defined channel or pipe on or under a servient tenement.[e]

(a) *Mason* v. *Hill* (1833) 5 B. & Ad. 1 (first claim).
Manning v. *Wasdale* (1836) 5 A. & E. 758.
Race v. *Ward* (1855) 4 E. & B. 702.
Watts v. *Kelson* (1870) L. R. 6 Ch. App. 166.
Burrows v. *Lang* [1901] 2 Ch. 502.
(b) *Bealey* v. *Shaw* (1805) 6 East, 208.
Saunders v. *Newman* (1817) 1 B. & Ald. 258.
Mason v. *Hill, ubi sup.* (second claim).
Northan v. *Hurley* (1853) 1 E. & B. 665.

[The right, subject to the similar rights of higher riparian proprietors, to have sufficient flow of a natural stream for ordinary domestic or agricultural purposes is, of course, not an easement, but a 'natural right of property' of every riparian owner against whom a counter-easement has not been acquired (*Mason* v. *Shrewsbury Ry. Co.* (1871) L. R. 6 Q. B., at p. 582, *per* Blackburn, J.; *McCartney* v. *Londonderry Ry. Co.* [1904] A. C. at p. 306, *per* Lord Macnaghten).]

(c) *Thomas* v. *Thomas* (1835) 2 C. M. & R. 34.
Harvey v. *Walters* (1873) L. R. 8 C. P. 162.
Brown v. *Dunstable Corporation* [1899] 2 Ch. 378.
(d) *Wright* v. *Williams* (1836) 1 M. & W. 77.
Beeston v. *Weate* (1856) 5 E. & B. 986.
Carlyon v. *Lovering* (1857) 1 H. & N. 784.

[It is probably as a right to divert that the anomalous right decided in *Simpson* v. *Mayor of Godmanchester* [1897] A. C. 696, to be an easement, can best be justified (see *per* Lord Davey, at p. 707).]

(e) *Watts* v. *Kelson* (1870) L. R. 6 Ch. App. 166. (This case shows, incidentally, that the owner of such a right is entitled to enter upon the servient tenement to repair the pipe.)

Light

1244. A right of light is the right to the uninterrupted access to the claimant's windows of a certain quantity, or reasonable quantity, of light across a ser-

vient tenement.[a] A right of air is a right to the uninterrupted access of air through an artificial channel from the servient to the dominant tenement.[b]

(a) The well-known decision in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179, has laid it down that, when the claim to light is founded on prescription (*semble*, under the Prescription Act, 1832), nothing can be alleged as an interference which does not amount to an actual nuisance, i. e. nothing which leaves reasonably sufficient light for ordinary purposes. And it has since been expressly held, that even proof of special user for twenty years will not enable the claimant to get more (*Ambler* v. *Gordon* [1905] 1 K. B. 417). But it is believed that no decision has ruled, that an exceptional quantity of light cannot be secured by express, or, even, presumably, by implied grant or prescription at common law. (But see remarks of Mellish, L. J., in *Kelk* v. *Pearson* (1871) L. R. 6 Ch. App., at p. 813, highly approved of in *Colls* v. *Home and Colonial Stores*, and of Parker, J., in *Browne* v. *Flower* [1911] 1 Ch., at p. 226). As to what is a "reasonable" amount of light, see the remarks of the learned lords in the *Colls* case on the "forty-five degrees rule." Probably there can be no right to light in respect of land uncovered by buildings, at any rate by prescription (*Roberts* v. *Macord* (1832) 1 Moo. & R. 230).

(b) The claim of air was at one time usually brought in connection with the claim of light; but no mention of air was made in the injunction (*Bryant* v. *Lefever* (1879) 4 C. P. D. 172). It was, however, hinted in that case, as well as in *Harris* v. *De Pimm* (1886) 33 Ch. D., at p. 250, and actually decided in *Cable* v. *Bryant* [1908] 1 Ch. 259, that a right to the access of air through a particular aperture may be acquired as an easement.

Re-building

1245. The fact that the owner of a dominant tenement pulls down or alters the building with a view to re-construction,[a] or changes the purposes to which it is put, does not destroy his right to light.[b]

(a) *Staight* v. *Burn* (1869) L. R. 5 Ch. 163.
Ecclesiastical Commrs. v. *Kino* (1880) 14 Ch. D. 213.
Andrews v. *Wait* [1907] 2 Ch. 500.

(b) *Ecclesiastical Commrs.* v. *Kino*, *ubi sup.*

[Of course, the alteration in the building or user cannot in law increase or alter the burden on the servient tenement (*Ankerson* v. *Connelly* [1907] 1 Ch. 678). But, in fact, it may be very difficult for the servient owner to obstruct enlarged or new windows without obstructing the old light. And a plaintiff whose lights have been obstructed is entitled, in the assessment of damages, to have it taken into account that he is owner of adjoining land which would enable him to erect a larger or better building (*Griffith* v. *Clay* [1912] 1 Ch. 291).]

Alternative lights

1246. The fact that, owing to the acts of other persons, the dominant tenement will, notwithstanding obstruction by the servient owner, receive as much light as before the obstruction, is no answer to a claim for obstruction; at any rate if the new light is not legally secured to the dominant tenement.

Dyers' Co. v. *King* (1870) L. R. 9 Eq. 438.
Colls v. *Home and Colonial Stores* [1904] A. C., at p. 211, *per* Lord Lindley.

[But, if the new light cannot be obstructed, its existence is important in determining whether the claimant's light is *de facto* reduced beyond a reasonable limit (*Dyers' Co.* v. *King*, *ubi sup.*, at p. 442, *per* James, V. C.).]

No rights of prospect or privacy

1247. Neither a right of prospect, nor a right of privacy, is recognized by English law as an easement.[a] But if a prospect is obstructed by an act which also amounts to a nuisance, special damages may be awarded for the obstruction of the prospect.[b]

(a) *Browne* v. *Flower* [1911] 1 Ch., at p. 225, *per* Parker, J.
(b) *Campbell* v. *Paddington Borough Council* [1911] 1 K. B. 869.

Support

1248. Rights of support recognized as easements by English law are (i) right to the support of buildings by subjacent or adjacent land,[a] (ii) right to the support of buildings by subjacent or adjacent buildings.[b]

(a) *Palmer* v. *Fleshees* (1663) 1 Sid. 167.
Dalton v. *Angus* (1881) L. R. 6 App. Ca. 740.
Union Lighterage Co. v. *London Graving Dock Co.* [1902] 2 Ch. 557.

[The right to support of land by subjacent or adjacent land is a 'natural right of property.' But a right to support of buildings is a true easement (*Wilde* v. *Minsterley* (1639) 1 Rolle, Ab. 565).]

(b) *Richards* v. *Rose* (1853) 9 Exch. 218.
Caledonian Ry. Co. v. *Sprot* (1856) 2 Macq. 499 (approved in *Dalton* v. *Angus*, *ubi sup.*, at p. 793, *per* Lord Selborne, C.).

[In *Solomon* v. *Vintners' Co.* (1859) 4 H. & N. 585, it was said, that no action would lie against the person who caused the fall by pulling down a house not next to the plaintiff's, but separated from it by a third house. *Sed quære.*]

Right to rest chattels

1249. An easement consisting of the right to place or fix chattels belonging to the owner of the dominant tenement upon the soil[a] or buildings[b] of a servient owner is recognized by English law.

(a) *Wood* v. *Hewett* (1846) 8 Q. B. 913.
Lancaster v. *Eve* (1859) 5 C. B. (N. S.) 717.
Hoare v. *Metr. B. of Works* (1874) L. R. 9 Q. B. 296.
(b) *Hawkins* v. *Wallis* (1763) 2 Wils. K. B. 173.
Gray v. *Bond* (1821) 2 Brod. & B. 667.
Moody v. *Steggles* (1879) 12 Ch. D. 261.
Francis v. *Hayward* (1882) 22 Ch. D., at p. 182, *per* Bowen, L. J.

Right of overhanging

1250. A right of projection is a right to cause buildings or chattels to project or be suspended over the servient tenement, for the benefit of the owner of the dominant tenement.[a] Such a right cannot be acquired by prescription in respect of projecting trees.[b]

(a) *Drewell* v. *Towler* (1832) 3 B. & Ad. 735.
Suffield v. *Brown* (1863) 33 L. J. Ch. 249.
Lemmon v. *Webb* (1894) 3 Ch., at p. 11, *per* Lindley, L. J.
(b) *Lemmon* v. *Webb*, *ubi sup.*

[And an action will lie against the owner of trees who allows them to overhang his neighbour's land to the damage of the latter's crops (*Smith* v. *Giddy* [1904] 2 K. B. 448).]

Duty of repairing fence

1251. The owner of one tenement may be bound by grant or prescription to repair a fence or hedge between his land and a neighbouring tenement, for the benefit of the owners and occupiers of such neighbouring tenement.

Star v. *Rookesby* (1710) 1 Salk. 335.
Boyle v. *Tamlyn* (1827) 6 B. & C. 329.
Lawrence v. *Jenkins* (1873) L. R. 8 Q. B. 274.
Coaker v. *Willcocks* [1911] 1 K. B. 649.

PROFITS À PRENDRE

Profit à prendre

1252. A *profit à prendre* is a right to take some definite part of the profits of the soil from or off the land of another person.[a] For this purpose, "profits of the soil" include herbage and natural vesture or produce of the soil, stone, sand, gravel, and other

minerals, fish, turves or peat, wood, and game; but not crops produced by human labour, or manufactured produce.[a]

(a) *Manning* v. *Wasdale* (1836) 5 A. & E., at p. 764, *per* Patteson, J.
Webber v. *Lee* (1882) 9 Q. B. D. 315.
D. of Sutherland v. *Heathcote* (1892) 1 Ch., at p. 484, *per* Lindley, L. J.
Lord Fitzhardinge v. *Purcell* [1908] 2 Ch., at p. 163, *per* Parker, J.
The King v. *Surrey* [1910] 2 K. B. 410.
(b) *Smart* v. *Jones* (1864) 15 C. B. N. S. 717 (where a right to dig and take away cinders was held not to be an interest in land). But a grant of *sola vestura* includes crops (Co. Litt. 4 b).

[There seems to be no reason to doubt that a claim to gather oysters *in alieno solo* could be established as a profit *à prendre*; even though the oysters were artificially cultivated.]

Vesture

1253. Rights to the vesture of the soil include rights of cutting and taking away heather and litter,[a] sticks,[b] rushes,[c] thorns,[d] and grass.[e] By a grant of the "vesture" itself, all such rights will pass to the grantee, as well as the crops growing on the land.[f]

(a) *Earl de la Warr* v. *Miles* (1880) 17 Ch. D. 535.
(b) *Chilton* v. *Corpn. of London* (1878) 7 Ch. D. 735.
Lord Rivers v. *Adams* (1878) 3 Ex. D. 361.
(c) *Bean* v. *Bloom* (1773) 2 W. Bl. 926.
(d) *Douglas* v. *Kendall* (1609) Cro. Jac. 256.
(e) *Crosby* v. *Wadsworth* (1805) 6 East, 602.
(f) Co. Litt. 4 b.

[At one time it seems to have been thought, that such a grant passed the property in the soil itself. But this view was overruled (*Tenants of Owning's Case* (1587) 4 Leon. 43; *Anon.* (1588) Owen, 37). See, however, the *dicta* to the contrary in *Bishop of Oxford's Case* (1621) Palm. 174. There may also be a grant of "first vesture" (*Bishop of Oxford's Case*, *ubi sup.*).]

Pasture

1254. Rights of pasture are either (i) several pasture,[a] or (ii) common of pasture.[b]

(a) Co. Litt. 4 a.
(b) *Ibid.* 122 a.

Several pasture

1255. Several pasture is the exclusive right to take the herbage of the servient tenement by the mouths of cattle or other beasts.[a] A grant of a several pasture does not of itself operate as a grant of the soil.[b]

(a) *Sir George Sparke's Case* (1621) Winch, 6.
Potter v. *North* (1669) 1 Wms. Saund. 346.
Johnson v. *Barnes* (1873) L. R. 8 C. P. 527.
Robinson v. *Duleep Singh* (1878) 11 Ch. D., at p. 805, *per* Fry, J.

[The owner of a several pasture may bring Trespass, i. e. no proof of actual damage is necessary (*Robinson* v. *Duleep Singh*, *ubi sup.*, at p. 813, *per* James, L. J.). He may also bring Ejectment (*Ward* v. *Petifer* (1634) Cro. Car. 362).]

(b) Co. Litt. 4 a.
Lord Chesterfield v. *Harris* [1908] 2 Ch., at p. 423, *per* Buckley, L. J.

[The language of Lord Kenyon in *Burt* v. *Moore* (1793) 5 T. R., at p. 333, may seem to be somewhat inconsistent with this doctrine. But the facts in that case were peculiar; and Coke's assertion is not seriously questioned.]

Common of pasture

1256. Common of pasture is the right to take, in common with the owner of the servient tenement, and with or without other persons, the herbage of the servient tenement by the mouths of cattle or other beasts.[a] Such a right may be for a limited

("stinted common") or unlimited number of beasts ("common *sans nombre*"),[b] or for a particular class or classes of beasts;[c] but common of pasture appendant or appurtenant cannot be *sans nombre*.[d]

(a) Co. Litt. 122 a.
(b) *Richards* v. *Squibb* (1698) 1 Ld. Raym. 726.
Brook v. *Willet* (1793) 2 H. Bl. 224.
(c) *Jones* v. *Richard* (1837) 6 A. & E. 530.
(d) *Bennett* v. *Reeve* (1740) Willes, 227.
Benson v. *Chester* (1799) 8 T. R. 396.
Baylis v. *Tyssen-Amherst* (1877) 6 Ch. D., at p. 507, *per* Jessel, M. R.

[The cases in which common *sans nombre* has been allowed in respect of appendant or appurtenant rights, are to be explained by assuming that, in such cases, common *sans nombre* merely means common for all commonable beasts *levant and couchant* (i. e. such a number as can be maintained in the winter) on the dominant tenement. (*Chichly's Case* (1658) Hardr. 117; *Morley* v. *Clifford* (1882) 20 Ch. D., at p. 757, *per* Fry, J.). By "maintained in the winter" is meant being fed during the winter on the food produced by the dominant tenement during the summer (*Robertson* v. *Hartopp* (1889) 43 Ch. D., at p. 516, *per Curiam*). In *Mellor* v. *Spateman* (1669) 1 Wms. Saund. 343, it was held, that even common in gross could not be *sans nombre*; but this doctrine seems not to have been followed (see *Weekly* v. *Wildman* (1698) 1 Ld. Raym., at p. 407, *per* Powel, J.).]

Pannage

1257. A right of pannage or pawnage is a right to take the droppings of oak, beech, and other trees growing on the servient tenement, by the mouths of hogs or swine.

Chilton v. *Corporation of London* (1878) 7 Ch. D., at p. 565, *per* Jessel, M. R.

[The existence of this right does not prevent the owner of the trees lopping them, or even cutting them down when ripe (*Chilton* v. *Corporation of London*, *ubi sup.*).]

Foldage

1258. A right of foldage is a right to have all or some of the sheep belonging to the owner of the servient tenement folded on the dominant tenement.

Anon. Y. B. (1486) 1 Hen. VII, Pasch. pl. 17.
Anon. Y. B. (1489) 5 Hen. VII, Mich. pl. 22.
Dickman v. *Allen* (1690) 2 Ventr. 138.
Brook v. *Willet* (1793) 2 H. Bl. 224.

[This right is not infrequently confused with the right of *fold-course*, which is simply an instance of common of pasture for a certain number, or unlimited number, of sheep (*Dickman* v. *Allen*, *ubi sup.*; *Robinson* v. *Duleep Singh* (1878) 11 Ch. D. 798). In the case in 1 Hen. VII, it was suggested that there could be no right of foldage in gross; because the whole object of the right was to improve the land of the owner of the right. But the point was not decided. It appears from *Brook* v. *Willet*, *ubi sup.*, that the right may exist as a condition of a right of common of pasture.]

Mineral rights

1259. Rights to minerals include the common or exclusive right [a] of digging or quarrying for stone,[b] clay,[c] gravel,[d] sand,[e] coal,[f] and other minerals, in or under the servient tenement.

(a) It may be questioned whether a claim which virtually asserted the right to destroy the servient tenement would be good, at any rate by prescription (*Clayton* v. *Corby* (1843) 5 Q. B. 415; *Hilton* v. *Granville* (1844) *ibid.* 710). But see *M. of Salisbury* v. *Gladstone* (1860) 6 H. & N. 123, which was, however, a claim by copyholders. It will be realized, that a claim may be limited, and yet exclusive (*D. of Sutherland* v. *Heathcote* [1892] 1 Ch., at p. 484.)

(b) *Maxwell* v. *Martin* (1830) 6 Bing. 522.
Constable v. *Nicholson* (1863) 14 C. B. N. S. 230.

(c) *M. of Salisbury* v. *Gladstone* (1860) 6 H. & N. 123.

(d) *Duberley* v. *Page* (1788) 2 T. R. 391.

(e) *Duberley* v. *Page*, *ubi sup.*
Blewett v. *Tregonning* (1835) 3 A. & E. 554.

(f) Co. Litt. 122 a.
Shuttleworth v. *Le Fleming* (1865) 19 C. B. N. S., at p. 709, *per Curiam.*

[It must be carefully noted, that the *ownership* of mines, i. e. mineral-bearing strata, is not an incorporeal but a corporeal hereditament, and cannot be claimed by prescription (*Wilkinson* v. *Proud* (1843) 11 M. & W. 33). Neither could it pass by grant before 1845 (*D. of Sutherland* v. *Heathcote*, *ubi sup.*, at p. 483). It is the right to search for and take away minerals in and from the soil of another, which is incorporeal.]

Fishing

1260. Rights to fish (other than franchise or ownership rights) are (i) several fishery in non-tidal waters, and (ii) common of piscary.

[The inconsistency in the use of words to describe fishing rights has been mentioned previously, and the practice adopted in this work explained (see *ante*, § 1229, n.).]

Several fishery

1261. A several fishery is the exclusive right of fishing in non-tidal water covering the soil of the servient tenement, and taking away the fish caught.[a] Such a right is presumed to include the ownership of the soil of the servient tenement; but this presumption may be rebutted.[b]

(a) Co. Litt. 122 a.
(b) *Smith* v. *Kemp* (1692) 2 Salk. 637, *per* Lord Holt, C. J.
Scratton v. *Brown* (1825) 4 B. & C. 485.
Holford v. *Bailey* (1846) 8 Q. B. 1000.
Marshall v. *Ulleswater Steam Navigation Co.* (1863) 3 B. & S. 732.
Fitzgerald v. *Firbank* [1897] 2 Ch., at p. 101, *per* Lindley, L. J.
Hanbury v. *Jenkins* [1901] 2 Ch., at p. 411, *per* Buckley, L. J.

[This point has been the subject of acute controversy; and the rule in the text is alleged (e. g. by Cockburn, C. J., in *Marshall* v.

Ulleswater, &c. Co., ubi sup., at p. 747) to be inconsistent with a well-known passage in Coke (Co. Litt. 4 b), where Coke says that on a grant of *separalis piscaria* "the soile doth not passe." But there appears to be no inconsistency. If an actual grant is produced, and a grant of a "fishery" (without more) is shown, Coke's rule applies (see *Hindson* v. *Ashby* [1896] 2 Ch., at p. 10, *per* Lindley, L. J., and *Ecroyd* v. *Coulthard* [1897] 2 Ch. 554). But if the claimant relies on a presumed conveyance, it will be presumed that this conveyance contained words apt to pass the soil. (*D. of Somerset* v. *Fogwell* (1826) 5 B. & C., at p. 886, *per Curiam.*) In such cases, of course, the owner of the right can bring Trespass against an intruder (*Holford* v. *Bailey*, *ubi sup.*); and, probably, the same rule applies where the soil is not included (*Hindson* v. *Ashby*, *ubi sup.*). He can also, as we have seen, seize the boats, gear, and tackle of the intruders, as damage feasants (*Reynell* v. *Champernoon* (1631) Cro. Car. 228). It is difficult, however, to understand how a man could prescribe for such rights; for they really amount to a corporeal hereditament.]

Change of river-bed

1262. The owner of a several fishery in a non-tidal river which gradually changes its course, is not by such change deprived of his exclusive right of fishing in the river; even though the ancient boundaries of the river can be traced.

Foster v. *Wright* (1878) 4 C. P. D. 438.

[*Semble*, the same rule applies to common of piscary. In this case, the Court distinguished the *Mayor of Carlisle* v. *Graham*, (1869) L. R. 4 Ex. 361 (*ante*, § 1231).]

Common of piscary

1263. Common of piscary is the right of fishing, in common with the owner or occupier of the servient tenement, and with or without other

persons, in water covering the soil of the servient tenement.

Co. Litt. 122 a.
Smith v. *Kemp* (1692) 2 Salk., at p. 638.

[The cases in which common of piscary has been actually recognized seem to be singularly few; except in the case of copyholders, whose rights can hardly be treated as exactly equivalent to incorporeal hereditaments, though on enfranchisement such rights might become true incorporeal hereditaments (*Tilbury* v. *Silva* (1890) 45 Ch. D. 98). Was the right established in *Fitz-gerald* v. *Firbank* (1897) 2 Ch. 96 ("exclusive right of fishing" with rod and line) common of piscary or several fishery?]

Turbary

1264. Common of turbary is the right of taking, in common with other persons, sufficient quantity of turves or peat for the purposes of a messuage to which the right is appendant or appurtenant.[a] *Semble*, there cannot be common of turbary in gross.[b]

(a) *D. & C. of Ely* v. *Warren* (1741) 2 Atk. 189, *per* Lord Hardwicke, C.
Peardon v. *Underhill* (1850) 16 Q. B. 120.
Lascelles v. *Onslow* (1877) 2 Q. B. D. 433.
(b) *Tyrringham's Case* (1584) 4 Rep., at 37 a.

[The destruction of an ancient messuage, to which rights of turbary and estovers were appurtenant, does not, necessarily, extinguish such rights, which may attach to a new messuage built to replace the old; provided that the change does not impose an additional burden on the servient tenement (*A. G.* v. *Reynolds* [1911] 2 K. B. 888).]

Estovers

1265. Common of estovers is the right of taking sufficient wood from the trees growing on the servient tenement for the repair and fuel of the messuage

to which the right is appurtenant. Such a right does not prevent the owner of the servient tenement making his profit of the wood; but if he does not leave sufficient to satisfy the right of estovers, an action for damages will lie against him.

Sir Henry Nevil's Case (1570) Plowd., at p. 381.
Luttrel's Case (1601) 4 Rep., at 87 a.
Basset v. *Maynard* (1601) Cro. Eliz. at 820.
Countess of Arundel v. *Steere* (1605) Cro. Jac. 25.

[The last case shows that a claim of estovers for building new houses on the same tenement may be supported by prescription.]

Game

1266. Rights to game (other than fish) are rights, exclusive or non-exclusive, of hunting, hawking, coursing, fowling, shooting, and taking away, beasts and birds upon land in the occupation of another person.[a] Any such right is now subject to the co-existing right of the occupier of the servient tenement (including the owner if he is also occupier) to kill ground game under the Ground Game Act, 1880, and the Ground Game (Amendment) Act, 1906.[b]

(a) *Wickham* v. *Hawker* (1840) 7 M. & W. 63.
Graham v. *Ewart* (1855) 11 Exch., at p. 346, *per Curiam*.
Jeffryes v. *Evans* (1865) 19 C. B. N. S. 246 (explaining *Graham* v. *Ewart*, *ubi sup.*, *ad fin.*).
Gearns v. *Baker* (1875) L. R. 10 Ch. App. 355.
Morgan v. *Jackson* [1895] 1 Q. B. 885.
Lowe v. *Adams* [1901] 2 Ch. 598.

[The extent of the right is a question of construction in each case (*Moore* v. *Lord Plymouth* (1817) 7 Taunt. 614); or, *semble*, if the claim is by prescription, a question of fact for the jury.]

(b) 43 & 44 Vict. (1880) c. 47.
6 Edw. VII (1906) c. 21.
Stanton v. *Brown* [1900] 1 Q. B. 671.
Anderson v. *Vicary* [1900] 2 Q. B. 287.

[As to the compensation for damage claimable by a tenant for damage to his crops by game, the right to take and kill which is not vested in him, see *ante*, § 783. A grant of a true profit *à prendre* must be carefully distinguished from a mere license to shoot.]

Rights of servient owner

1267. An occupier over whose land a right of sporting exists may, in the absence of express agreement to the contrary, do any act in the *bonâ fide* management of his land; notwithstanding that such act may incidentally prejudice the sporting right. This rule does not extend to acts done with the express intention of causing such prejudice.

Jeffryes v. *Evans* (1865) 19 C. B. N. S.
Gearns v. *Baker* (1875) L. R. 10 Ch. App. 355.

Rights of sportsmen

1268. The person in whom a right of sporting is vested may do any acts upon the land which are reasonably necessary for preserving the enjoyment of such right; even though such acts are *primâ facie* unlawful.

(No. 2) *Cope* v. *Sharpe* [1912] 1 K. B. 497. ('Reasonably necessary' mean, such a state of facts that a reasonable man would have done what the defendant did.)

Overloading with game

1269. The person in whom a right of sporting is vested is liable to an action for damages and, if nec-

essary, an injunction, by the occupier of the servient tenement; if the owner of the right of sporting, by artificial means, so increases the game on the servient tenement as to cause damage to the crops grown thereon. *Semble*, if he does, the occupier may also destroy the excess of game.

Birkbeck v. *Paget* (1862) 31 Beav. 403.
Farrer v. *Nelson* (1885) 15 Q. B. D. 258.

[For the difficult question whether such a person is liable (apart from statute) to his neighbours, see *ante*, Bk. II, Pt. III, § 783.]

ADVOWSONS

Advowson

1270. An advowson is the perpetual right of patronage of an ecclesiastical benefice.[a] Advowsons may be either presentative (where the right is only to present a fit clerk to the bishop of diocese),[b] or collative (where the bishop has the right both to nominate and to institute).[c]

(a) Co. Litt. 17 b.
A. G. v. *Ewelme Hospital* (1853) 17 Beav., at p. 383, *per* Romilly, M. R.

[In the last case, it was suggested by the Court that the term would, at one time, also have included the right of nomination to a benefice not strictly ecclesiastical, e. g. eleemosynary or academic.]

(b) But where a fit clerk is presented, the right is legal and absolute (*Bishop of Exeter* v. *Marshall* (1867) L. R. 3 H. L. 17). It is even said that it may be exercised by word of mouth (*A. G.* v. *Brereton* (1751) 2 Ves. Sr., at p. 429, *per* Lord Hardwicke, C.).

(c) There was formerly a third kind of advowson, called "donative," by virtue of which the patron nominated, instituted, and inducted. But these are now, if accompanied by cure of souls, converted into advowsons presentative by the Benefices Act, 1898, s. 12.

[An advowson, though a "hereditament," and even a "tenement," is not properly described as being "situate at" any particular place; though it may pass under such a description, if the whole of the circumstances and expressions of the conveyance point to that conclusion (*Crompton* v. *Jarratt* (1885) 30 Ch. D. 298). An advowson is available to satisfy the debts of its owner, both during his lifetime (Judgments Act 1838, s. 11) and after his death (*Tong* v. *Robinson* (1730) 1 Bro. P. C. 114. But the creditors' rights are now, presumably, subject to the restrictions on the sale of advowsons imposed by the Benefices Act, 1898 (*post*, § 1271).]

Restraints on transfer

1271. No transfer of an advowson is valid unless:—

(i) it is registered in the prescribed manner in the registry of the diocese (? in which the church is situated) within one month from the transfer, or such other time as the bishop may think fit to allow;

(ii) it transfers the whole interest of the transferor (except that a life interest may be reserved to the settlor in a family settlement, and a right of redemption may be reserved in a mortgage);

(iii) more than twelve months have elapsed since the last institution or admission to the benefice.

Benefices Act, 1898, s. 1 (1).

[This enactment put an end to the practice of alienating "next presentations"; at one time very common. *Semble*, such rights of next presentation as still exist may be exercised, subject to the provisions of the Act. A 'transfer' does not include any transmission by operation of law, nor a transfer on the appointment of new trustees, where no beneficial interest passes (*ibid.* (6)).]

No separate sale by auction

1272. No advowson may be offered for sale by public auction, except in conjunction with a manor,[a] or with an estate in land of not less than one hundred acres situate in the same parish as the benefice, or an adjoining parish, and belonging to the owner of the advowson.[b]

(a) Does this mean strictly appendant or appurtenant to the manor; or merely in the same ownership?

(b) Benefices Act, 1898, s. 1 (2).

[Breach of this rule renders the breaker liable to a penalty of £100, recoverable on summary conviction (*ibid.*).]

Next presentations and resignations

1273. No agreement for the exercise of a right of ecclesiastical patronage in favour or on the nomination of any particular person, is valid; nor is any agreement on the transfer of an advowson valid which contemplates: —

(i) the re-transfer of the advowson;

(ii) the postponement of the payment of the consideration for such transfer, or the payment of interest, until a vacancy, or for more than three months;

(iii) any payment in respect of the date at which a vacancy occurs;

(iv) the resignation of a benefice in favour of any person.

Ibid. s. 1 (3).

[This clause aims at putting an end to both the purchase of "turns" with a view of presenting the purchaser, and the gift of

a living to be held until another candidate is ready. *Semble*, the Benefices Act, 1898, does not, except as above stated, affect the validity of a resignation bond given by a clergyman on his presentation under the Clergy Resignation Bonds Act, 1824.]

Void benefice

1274. A transfer by act of a private person of a vacant benefice cannot pass the right to present to the existing vacancy.

Stephens v. *Wall* (1569) 3 Dyer, 282 b.
Brooksbie's Case (1590) Cro. Eliz. 173.
Fox v. *B. of Chester* (1829) 6 Bing., at p. 17, *per* Best, C. J.

[The rule has no application to the Crown (*Stephens* v. *Wall*, *ubi sup.*); but, even on a grant by the Crown, the next presentation to the existing vacancy will not pass unless expressly named (*Case of Bedminster Manor* (1571) 3 Dyer, 300 a; *Weston's Case* (1576) *ibid.* 347 a). The vacant turn remains with the grantor or his personal representatives (*Stephens* v. *Wall*, *ubi sup.*).]

'Appurtenances'

1275. By the grant of a manor with its appurtenances by the Crown, an advowson which is appendant to the manor does not pass; unless it is expressly included in the grant.[a] A similar rule holds in the case of a demise for years of a manor by a private person, without mention of "appurtenances." [b]

(a) De Prærogativâ Regis (17 Edw. II (n. d.)), c. 17.
Gorge's and Dalton's Case (1587) 3 Leon. 196.
Whistler's Case (1613) 10 Rep. 63 a.
(b) *Higgins* v. *Grant* (1583) Cro. Eliz. 18.

[Presumably, in spite of the words of the so-called statute, the doctrine applies to advowsons appendant. *Quære:* can there be an advowson appurtenant? By a temporary severance of an ad-

vowson from a manor, the advowson becomes a gross; but on re-union with the manor, it becomes once more appendant (*Ive's Case* (1597) 5 Rep., at 11 b; *Hartopp's and Cock's Case* (1627) Hutt. 88; *Rooper* v. *Harrison* (1855) 2 Kay & J., at p. 109, *per* Wood, V. C.). For the general rule about the passing of rights appendant or appurtenant on a conveyance of the dominant tenement, see *ante*, § 1195.]

Simony

1276. Any purchase of a next presentation by a clerk with a view to his own presentation, renders such presentation void, and is a cause of forfeiture of the turn to the Crown.[a] But the owner of an advowson, however small his interest,[b] or of the next presentation,[c] may offer himself or other fit clerk to the bishop for institution.

(a) Simony Act, 1713, s. 2. (Of course this provision is, so far as future transactions are concerned, rendered practically unnecessary by s. 1 (1) of the Benefices Act, 1898 (*ante*, § 1271), which makes the sale of next presentation void in any circumstances.)
Lee v. *Merest* (1870) 39 L. J. Ecc. 53.

(b) *Sherrard* v. *Lord Harborough* (1753) Ambl., at p. 166, *per* Lord Hardwicke, C.
E. of Albemarle v. *Rogers* (1796) 7 Bro. P. C. 522 (estate for years).
Walsh v. *B. of Lincoln* (1875) L. R. 10 C. P. 518 (estate *pur autre vie*).
Lowe v. *B. of Chester* (1883) 10 Q. B. D. 407.

(c) *Harris* v. *Austin* (1613) 3 Bulstr. 36.

Lapse to Crown by promotion

1277. Where a beneficed clerk is promoted by the Crown, the right to present to the vacancy caused by his promotion passes to the Crown. But the owner of the next presentation, who has thus been deprived of his turn, may present to the next vacancy

of the benefice.[a] The fact that the Crown has itself previously sold the advowson to a private person, does not deprive the Crown of the right to present on a vacancy caused by promotion.[b]

(a) *Troward* v. *Calland* (1796) 8 Bro. P. C. 71.
(b) *The Queen* v. *Eton College* (1857) 8 E. & B. 610 (*dictum*).

[The prerogative of the Crown does not extend to a vacancy caused by the promotion of an incumbent to a colonial bishopric erected and constituted solely by the exercise of the prerogative. *Quære:* as to a bishopric in Ireland or constituted under Act of Parliament (*The Queen* v. *Eton College*, *ubi sup.*).]

Patronage of Catholics and Jews

1278. No Roman Catholic may present to any ecclesiastical benefice (of the Church of England); and no person holding an advowson or right of presentation in trust for a Roman Catholic, may present any clerk to such benefice;[a] and no Jew may exercise official ecclesiastical patronage, or advise the Crown with regard to the exercise of such patronage.[b] The right to exercise Anglican ecclesiastical patronage vested in or held in trust for Roman Catholics, belongs to the Universities of Oxford and Cambridge;[c] the right to exercise the ecclesiastical patronage of an office under the Crown held by a Jew, belongs to the Archbishop of Canterbury for the time being.[d]

(a) 1 & 2 W. & M. (1688) c. 26, ss. 1 & 2 (affirming 3 Jac. I (1605) c. 5), which gives the division between the universities.
Presentation of Benefices Act, 1713, s. 1.
Church Patronage Act, 1737, s. 5. (This Act avoids all transfers of advowsons by Catholics, other than *bonâ fide* sales to Protestant purchasers.)
Roman Catholic Relief Act, 1829, s. 16.

(b) Jews Relief Act, 1858, s. 4.
(c) 3 Jac. I (1605) c. 5.
Benefices Act, 1898, s. 7.
(d) Jews Relief Act, 1858, s. 4.

Lapse of vacancy

1279. If the patron of an ecclesiastical benefice allows it to remain vacant for six calendar months, the ordinary of the diocese (not being himself the patron) may present and institute at any time within the next six months.[a] If such ordinary does not present within such period, or is not entitled to present, the archbishop of the province (not being patron or ordinary) may present at any time within a further period of six months.[b] If such archbishop is not entitled to present, or does not present, within such further period, the right of presentation for that turn lapses to the Crown.[c] But the patron may present at any time before the benefice has been filled.[d]

(a) Statute of Provisors (25 Edw. III (1351) st. 4).
Ordinance for the Clergy (25 Edw. III (1351) st. 6) c. 7.
Archbishop of York's and Willock's Case (1573) 3 Dyer, 327 b.
Catesby's Case (1606) 6 Rep. 61 b.

[If the vacancy is caused by resignation or deprivation, the patron's period only begins to run from receipt by him of notice of the vacancy (13 Eliz. (1571) c. 12, s. 7; Clergy Discipline Act, 1892, s. 6 (3)). So also, if the bishop refuses the patron's presentee for illiteracy (but not for crime), the period of lapse will be suspended until notice of such refusal is given to the patron (*Hale* v. *B. of Exeter* (1691) 2 Salk. 539).]

(b) *Bedinfield* v. *Abp. of Canterbury* (1570) 3 Dyer, 292 b.
Grendon v. *B. of Lincoln* (1575) Plowd., at p. 498.
Lancaster v. *Lowe* (1615) Cro. Jac., at p. 93.

(c) Statute of Provisors, *ubi sup.*
(d) *The King* v. *B. of Winton* (1604) Cro. Jac. 53.
Booton v. *B. of Rochester* (1618) Hutt. 24.

[There appears to be some doubt whether a presentation by the patron is good if the turn has lapsed to the Crown (*Cumber* v. *Ep. Chichester* (1608) Cro. Jac. 216). Where there has been a refusal of the bishop to institute or admit, the period which has elapsed between the presentation and the refusal is not counted for purposes of lapse; nor, if there is an appeal against the refusal, is the time between refusal and the decision of the appeal counted (Benefices Act, 1898, s. 5). The question of vacancy or plenarty of the benefice is for the ecclesiastical court (25 Edw. III (1351) st. VI, c. 8).]

TITHE RENT CHARGE

Tithe rent charge

1280. Tithe rent charge is an annual sum of money charged upon and issuing out of land formerly subject to a claim of tithes, in lieu of such tithes.

Walsh v. *Trimmer* (1867) L. R. 2 H. L. 208.

[Tithes, or the tenth part of the produce of land, were claimable as of common right by the ordinary of the parish from all land therein, i. e. it was presumed that all land was subject to the claim. Many exemptions were, however, recognized, e. g. certain lands formerly held by ecclesiastical corporations were exempt, a *modus* or composition in lieu of tithe might be validly agreed on, or, simply as the result of long *de facto* exemption, a legal release might be presumed (fixed by the Tithe Act, 1832, s. 1, at sixty years, or two occupations of the claimant's benefice and three years more, whichever is the longer period). Tithes were described as "great," i. e. those of hay, corn, and wood, or "small" (or "privy"), i. e. those of other produce. The former, or the equivalent for them, may be in lay hands, which fact makes them properly the subject of this work. The inconveniences attendant upon the taking of tithes in kind led to the passing of a series of statutes (known as the Tithe Acts, 1836 to 1891) having for their object the commutation of tithes in kind into an annual rent charge, varying with the

price of corn, formerly the chief subject of tithe. It will be noted, however, that the commutation is of the liability to tithes, not of the tithe actually taken; and, consequently, as new land is brought into cultivation, it becomes (subject to §§ 1283, 1284) liable to tithe rent charge (*Walsh* v. *Trimmer*, *ubi sup.*). It should be noted also, that the Commutation Acts do not apply to tithes of fish or fishing, personal tithes, or mineral tithes; except where there is a parochial agreement approved by the Board of Agriculture and Fisheries (Tithe Act, 1836, s. 90), by which the commutation of tithes is now effected (Board of Agriculture Act, 1889, s. 2, and Sched. I, Pt. II).]

Liability for

1281. Tithe rent charge is payable by the owner of the land subject to the charge; and any contract made since 26th March, 1891, between the owner and the occupier of such land, for the payment of the charge by the occupier, is void. If a contract to that effect was entered into before that date, the occupier is not bound by it; but he is liable to pay to the owner of the land such sum as such owner shall have properly paid on account of the charge agreed to be paid by the occupier.

Tithe Act, 1891, ss. 1, 9 (i).

[For the definition of "owner" see Tithe Act, 1836, s. 12.]

Recovery of

1282. The owner of tithe rent charge (other than a charge payable under the Extraordinary Tithe Redemption Act, 1886, or a charge representing tithes on gated or stinted pasture, or a sum or rate assessed as tithe on common rights of pasture) may recover

the charge, either by distress (where the land subject to the charge is occupied by the owner of such land) or by the appointment of a receiver of the rents and profits of the land (where the owner of the land is not in occupation).[a] There is no personal liability (apart from express contract) for the payment of ordinary tithe rent charge.[b]

(a) Tithe Act, 1891, s. 2.

[The distress is effected through the officer of the County Court, who exercises the powers conferred on the owners of tithe rent charge by ss. 81–85 of the Tithe Act, 1836, which include the power to obtain possession of the land if there is no sufficient distress. Not more than two years' arrears may be recovered (Tithe Act, 1891, s. 10 (1)).]

(b) Tithe Act, 1836, s. 81.
Tithe Act, 1891, s. 2 (9).

Remission of excess

1283. Where the County Court is satisfied that the sum claimed as tithe rent charge in proceedings under § 1282 exceeds two-thirds of the value of the lands on which it is charged, being lands used solely for agricultural or pastoral purposes, or for the growth of timber or underwood, for the twelve months preceding the date on which it fell due, the Court must remit such excess.

Tithe Act, 1891, s. 8.

[The section contains various provisions for relieving the owner of the tithe rent charge of a corresponding proportion of rates, for apportioning the remission between the owners of various charges

on the same land, and for the case of special apportionment of the charge on different parts of land out of the whole of which the tithes which it represents were formerly payable.]

Extraordinary tithe rent charge

1284. An "extraordinary tithe rent charge" is an annual sum charged on and issuing out of land formerly subject to an extraordinary charge under the Tithe Act, 1836, in lieu of liability to such charge.[a] Subject to any agreement made before the 25th June, 1886, such charge is payable by the landlord[b] of the land subject thereto. Such extraordinary tithe rent charge is a first charge on the land subject to it; it is recoverable by action as well as in the manner applicable to ordinary tithe rent charge (§ 1282, *ante*); and it is not subject to any parochial, county, or other rate, charge, or assessment.[c]

(a) Extraordinary Tithe Redemption Act, 1886, s. 3.
(b) *Ibid.*, s. 7. (There is no definition of the term "landlord" in the Act; but the definition given of "landowner" seems to agree with that referred to above in § 1281, n.)
(c) *Ibid.*, s. 4.

[Extraordinary tithe rent charge represents a charge reserved by the Tithe Act, 1836, s. 42, to be claimed by the tithe-owner in respect of land newly cultivated in a specially profitable way, e. g. as hop grounds, orchards, fruit plantations, and market gardens. This charge was abolished in 1886, as regards land newly cultivated after the passing of that Act; but it was provided by the Act that the Land Commissioners (now the Board of Agriculture) should value the capital liability then existing in respect of it throughout the country, and assess on the land liable a perpetual rent charge equivalent to 4 *per cent. per annum* on such capital value. Thus the charge under the Act only applies to land cultivated before the passing of the Act in the manner specified.]

1285. No ordinary tithe rent charge is merged or extinguished by implication of law in any estate of which the person for the time being entitled to such rent charge may be seised or possessed in the land subject to the charge.(a) But the owner in possession in fee simple or fee tail, or the person having the power of acquiring or disposing of the fee simple, whether legal or equitable, of such rent charge, may, by signed and sealed declaration, approved by the Board of Agriculture, release, assign, or otherwise dispose of the same, so as to cause a merger thereof in the freehold and inheritance of the land subject to the charge.(b) And where such tithe rent charge and the land subject thereto are settled to the same uses, the owner of an estate for life, legal or equitable, in both the land and the charge, has similar powers.(c) Where tithe rent charge is merged under these provisions, all existing incumbrances on the charge become incumbrances on the inheritance of the land.(d) *Merger*

(a) Tithe Act, 1836, s. 71.
(b) *Ibid.*
Tithe Act, 1838, s. 1.
Tithe Act, 1846, s. 19.

[The approval of the Board of Agriculture is conclusive of the title to make the merger (*Walker* v. *Bentley* (1852) 9 Ha. 629).]

(c) Tithe Act, 1838, s. 3.
(d) Tithe Act, 1839, s. 1.

[These provisions apply equally to copyholds of inheritance or for life (Tithe Act, 1838, s. 4; 1839, s. 7). There appears to be no provision as to the merger of extraordinary tithe rent charge.]

Redemption of tithe rent charge

1286. The owner of, or any person interested in, land subject to extraordinary tithe rent charge, at his own option,[a] the owner of the land subject to an ordinary tithe rent charge not exceeding twenty shillings, or the owner of such charge, at his own option,[b] and the owner of land subject to an ordinary tithe rent charge exceeding twenty shillings, with the concurrence of the owner of the rent charge,[c] may redeem or cause to be redeemed such rent charge with the approval of the Board of Agriculture, in manner provided by the Tithe Acts, 1836 to 1891.

(a) Extraordinary Tithe Redemption Act, 1886, s. 5.

[In this case, the redemption money is simply the capital value of the liability as estimated by the Board under § 1284, n. In the case of charge payable to an incumbent of a benefice, the redemption money is paid to the Commissioners of Queen Anne's Bounty. In other cases it is paid to an absolute owner, or into the Bank of England (*ibid.*).]

(b) Tithe Act, 1878, s. 3.

[The redemption money is here twenty-five times the amount of the charge (*ibid.*).]

(c) *Ibid.* s. 4.

[The consents of the bishop and patron are required when the charge exceeds twenty shillings, and is received by the incumbent of a benefice as such (Tithe Act, 1878, s. 4). Where the land is so sub-divided for building or other purposes that the charge cannot conveniently be apportioned, the Board may, on application of the owner of the charge, direct redemption on payment of a sum not exceeding twenty-five times the amount of the charge (*ibid.* s. 5). Where land is acquired for certain public purposes (e. g. church, cemetery, public elementary school, municipal building, artizans' dwellings, sewage farm, water works), the promoters of the scheme *must* redeem the charge on payment of twenty-five times its amount (Tithe Act, 1878, s. 1).]

RENT CHARGE (OTHER THAN TITHE RENT CHARGE)

Rent charge

1287. A rent charge (not being a tithe rent charge) is an annual sum of money or other render charged on and issuing out of land, or an estate in land, and payable by the terre-tenant of the land, but not by way of service to a reversioner.

Litt. s. 218.
Co. Litt. 143 b–147 b.

[Rents charge played a much more important part in former times than now, when the repeal of the Usury Acts and the appearance of many other forms of investment have rendered them of less importance. They were contrasted from early times with rents service, i. e. rents reserved on the creation of tenure. Rents not incident to tenure could not be recovered by distress; unless they were granted with a clause giving a right of distress, in which latter case the rent was known as a "rent charge," while a rent not recoverable by distress was known as a "rent seck." The passages above referred to, however, show that the grant of an express power of distress to recover a non-tenurial rent was well known in the fifteenth century; but it is only comparatively recently that such power has been made independent of express grant. The distinction between rents charge (in the older sense) and rents seck is now obsolete (Landlord and Tenant Act, 1730, s. 5).]

Personal liability of terre-tenant

1288. In addition to the statutory remedies of distress and eviction (§ 1289), and any equitable remedy in respect of the land (§ 1290), the person entitled to a rent charge may, in the absence of express provision to the contrary, recover the amount

thereof from the terre-tenant of the land (including a mortgagee) by action of debt.

Litt. ss. 219, 220, 233, 238.
Co. Litt. 144 b–147 b.
Thomas v. *Sylvester* (1873) L. R. 8 Q. B. 368.
Christie v. *Barker* (1884) 53 L. J. Q. B. 537.
Pertwee v. *Townsend* [1896] 2 Q. B. 129.
Re Herbage Rents [1896] 2 Ch. 811.
Foley's Charity v. *Corporation of Dudley* [1910] 1 K. B. 317.
Cundiff v. *Fitz-simmons* [1911] 1 K. B. 513.

Presumably the terre-tenant is only liable for rent which accrues due during his tenancy (*Fairfax* v. *Derby* (1708) 2 Vern. 612). But, subject to that restriction, his liability is not limited by the value of the profits which he has actually received (*Re Herbage Rents*, *ubi sup.*; *Foley's Charity* v. *Dudley*, *ubi sup.*). And an owner of part of the land subject to the charge can be sued in respect of the whole arrears (*Booth* v. *Smith* (1884) 51 L. T. 395); being left to his action to recover a proportion from the owners of the rest (*Christie* v. *Barker*, *ubi sup.*). But a tenant for years at a rack rent is not a "terre-tenant" for purposes of this § (*Re Herbage Rents*, *ubi sup.*); though a mortgagee in fee is, even though he has never entered (*Cundiff* v. *Fitz-simmons* [1911] 1 K. B. 513). It is said by Coke (Co. Litt. 144 b) that no personal remedy lies for the recovery of a rent granted for "owelty" (equality) of partition, or of such a rent as can be created without deed.]

Recovery by distress

1289. The person entitled to a rent charge created since 1881 may, subject to all interests having priority to the charge, if payment is in arrear for twenty-one days, enter upon the land subject to the charge, and distrain thereon for such arrears and costs, and, if payment is in arrear for forty days, enter into possession and hold such land, or any part thereof, and take the income thereof, without im-

peachment of waste, until all arrears are fully paid, and, whether taking possession or not, may demise the land, or any part thereof, to a trustee for a term of years upon trust to raise such arrears.[a] The person entitled to a rent charge created before 1881, may distrain for arrears; but has not the other remedies above specified in this §.[b]

(a) Conveyancing Act, 1881, s. 44.
(b) Landlord and Tenant Act, 1730, s. 5.

[The remedies given by the Conveyancing Act, 1881, s. 44, are strictly confined to the extent to which these remedies "might have been conferred by the instrument under which the (rent) arises." *Quære:* Can the owner of a rent charge distrain on the goods of strangers? For an anticipation by the Court of Chancery of part of these statutory remedies, see *Foster* v. *Foster* (1700) 2 Vern. 386.]

Equitable remedies

1290. In addition to the remedies described in §§ 1288, 1289, the Court, in the exercise of its equitable jurisdiction, may, on the application of the owner of the rent charge, order a sale or mortgage of the estate out of which the rent charge issues, in order to raise arrears thereof.

Cupit v. *Jackson* (1824) 13 Price, 721.
Hambro v. *Hambro* [1894] 2 Ch. 564.

[In both these cases the settlements were made before 1882; but, though the decision in the latter was given many years after the passing of the Conveyancing Act, 1881, the Court made no exception in respect of rents charge coming within s. 44 of that Act.]

No action of waste by rent-charger

1291. (*Semble*) the owner of a rent charge cannot bring an action to restrain waste by the terre-tenant.

Sandeman v. *Rushton* (1891) 61 L. J. Ch. 136.

Release of part of land

1292. Notwithstanding the release by the owner of the rent charge of a portion of the land on which it is chargeable, the owner of the residue of the land will be liable to pay such part of the charge as is proportionate to such residue.

Co. Litt. 148 a.
Law of Property and Amendment Act, 1859, s. 10.
Booth v. *Smith* (1884) 14 Q. B. D. 318.

[If the owner of the unreleased part of the land joins in the release, his part remains liable for the whole charge (*Price* v. *John* [1905] 1 Ch. 744).]

Division and extinction of charge

1293. A rent charge is divisible;[a] but the purchase by the owner of the rent charge of part of the land subject to the charge will extinguish the charge entirely.[b]

(a) Co. Litt. 148 a.
Ards v. *Watkins* (1597) Cro. Eliz. 637, 651.
(b) Litt. s. 222.
Dennett v. *Pass* (1834) 1 Bing. N. C. 388. (But see *Knight* v. *Calthorpe* (1685) 1 Vern. 347.)

[The rule is otherwise when the part of the land comes to the owner of the rent charge by operation of law (Litt. s. 224). *Quære:* whether the personal remedy is gone (Co. Litt. 150 a). A rent charge (including a tithe rent charge) is apportionable day by day in respect of time; but the person liable to pay it is not bound to pay any apportioned part until the ordinary day for payment arrives (Apportionment Act, 1870, ss. 2, 3).]

1294. Any perpetual rent charge (not being a tithe rent charge or a rent reserved on a sale or lease or made payable under a grant or license for building purposes) may be redeemed by the owner of the land subject thereto, on payment or tender to the person absolutely entitled thereto, or entitled to dispose thereof absolutely or to give an absolute discharge for the capital value thereof, of the amount of money certified by the Board of Agriculture as the redemption value thereof. *Redemption of charge*

Conveyancing Act, 1881, s. 45.

OFFICES

1295. An office, for the purposes of this Title, consists of the right to perform certain duties in connection with land, and to take such salary, fees, and perquisites therefor or in connection therewith, during such period, as may be prescribed by the grant creating the office or sanctioned by custom. *Office*

Litt. s. 378.
Co. Litt. 233.

[It was of the essence of feudalism, that functions, which we should now consider to be properly functions of the State, should be performed by subjects in connection with the tenure of land, and be remunerated either out of the profits of the land or the fees paid by persons resorting to the offices. Thus these offices came to be regarded as private property, and were freely bought and sold. At the close of the Middle Ages, a strong effort was made to put an end to this practice, by the Sale of Offices Act, 1551, which prohibited the traffic in offices concerned with the administration of justice, the receipt or disbursement of the royal revenue, and the management or custody of the royal domains or places of national

defence. But offices of inheritance then actually in the hands of subjects, and forest and manorial offices, were expressly excepted (s. 3); and an exception was also made (s. 7) of judicial patronage. As the result of a long course of political and economic reform, most of the excepted offices, other than those of a purely ceremonial character, have been converted into offices held at pleasure or during good behaviour; but the offices of various franchises which still survive (§§ 1205, 1208, 1209, 1215, and see *Godbolt's Case* (1577) 4 Leon. 33), of which the most conspicuous is the stewardship of a manor, render it necessary to deal briefly with the topic. Whether an owner of land can attach to it a new proprietary office of a purely private character, is a question on which there does not appear to have been any decision; but, on general principles (*ante*, §§ 1188, 1201), the answer would seem to be in the negative. Strictly, an office can only be created or transferred by deed. But an appointment by deed may be presumed on evidence of holding (*McMahon* v. *Lennard* (1858) 6 H. L. C. 970).]

Reversionary office

1297. Subject to any express or implied statutory prohibition, a grant of an office in reversion by a private person is good.

Young v. *Stowell* (1632) Cro. Car. 279.

[It was held in *Reynel's Case* (1612) 9 Rep. 94 b, that a grant for years of an office requiring the exercise of trust or discretion was void. But that was a Crown office. *Quære:* as to a private office.]

Discharge of incumbent

1298. Where there is no fee or profit attached to the holding of an office, the holder thereof may be discharged by the grantor before his (the holder's) interest has expired. Where a fee or profit is attached, the rule is the other way.

Co. Litt. 233.
Harvy v. *Newlyn* (1601) Cro. Eliz. 859.
Bartlett v. *Downes* (1825) 3 B. & C. 616.

Implied condition of good behaviour

1299. To every grant of an office an implied condition is annexed for the due performance by the grantee of the duties of the office; and breach of such a condition upon request of performance is a cause of forfeiture.[a] Acceptance of an incompatible office is also a cause of forfeiture.[b]

(a) Litt. s. 378.
Co. Litt. 233 b.
Earl of Shrewsbury's Case (1610) 9 Rep. 50.
Bennet v. *Easedale* (1626) Cro. Car. 55.
(b) *R.* v. *Patteson* (1832) 4 B. & Ad. 9.

[Forfeiture by a tenant in tail is a forfeiture of the entire office; but forfeiture by a holder for life of an inheritable office is only forfeiture of the life interest (*Nevil's Case* (1604) 7 Rep. 33 a). If the office is one which could be surrendered by the holder at pleasure, the forfeiture takes place at once on the acceptance of an incompatible office; if not, the office is not actually vacated till amotion (*R.* v. *Patteson*, *ubi sup.*).]

Alienation of office

1300. Whether the grantee of an office has power to alienate it, is a question of construction of the terms of the grant. If the grantee has power to alienate, he has power to appoint deputies.

Earl of Shrewsbury's Case, *ubi sup.*, at 48 b.

[Where the office involves the exercise of special skill, there is a presumption against its alienability (*Sir Henry Nevil's Case* (1570) Plowd. 379).]

TITLE X — CUSTOMARY RIGHTS OVER LAND

Customary right

1301. A right in the nature of an easement over land may be claimed on the ground of immemorial custom by a person on behalf of himself and other members of a limited but indeterminate class, defined by reference to locality, independently of the occupation or ownership of any dominant tenement.[a] A right in the nature of a profit *à prendre* (other than a mining right[b] or a right under a manorial custom)[c] cannot be so claimed;[d] at any rate except upon payment of a reasonable fee.[e] A customary right over land will be construed strictly.[f]

(a) *Abbot* v. *Weekly* (1665) 1 Lev. 176.
Fitch v. *Rawling* (1795) 2 H. Bl. 393.
Tyson v. *Smith* (1838) 9 A. & E. 406 (Here the restriction of locality was very vague).
Mounsey v. *Ismay* (1863) 1 H. & C. 729.
Bourke v. *Davis* (1889) 44 Ch. D., at p. 120, *per* Kay, J.
Mercer v. *Denne* [1905] 2 Ch. 538.

[*Edwards* v. *Jenkins* [1896] 1 Ch. 308, in which Kekewich, J., decided that a customary right of user of land could not be claimed on behalf of the inhabitants of three adjacent parishes, is probably wrong.]

(b) *Rogers* v. *Brenton* (1847) 10 Q. B. 26.
Ivimey v. *Stocker* (1866) L. R. 1 Ch. App., at p. 403, *per* Lord Cranworth, L. C. ("any persons").

(c) Copyhold customs are really only a method of dividing the ownership of the soil between the lord and his tenants; they bear little analogy to the so-called "freehold customs" treated in this Title. For the rules affecting copyhold customs, see *ante*, Title V, especially § 1091.

(d) *Gatewara's Case* (1607) 6 Rep. 59 b.
Grimstead v. *Marlowe* (1792) 4 T. R. 717.
Lloyd v. *Jones* (1848) 6 C. B. 81.
Bland v. *Lipscombe* (1854) 4 E. & B. 713 n.
Allgood v. *Gibson* (1876) 34 L. T. 883.
Fitzhardinge v. *Purcell* [1908] 2 Ch., at p. 163, *per* Parker, J.

(e) *Mills* v. *Mayor of Colchester* (1867) L. R. 2 C. P., at p. 484, *per Curiam.*
Sowerby v. *Coleman* (1867) L. R. 2 Exch., at p. 100, *per* Channell, B.

(f) *Rogers* v. *Brenton, ubi sup.*, at p. 57.

[Customary rights of user stand midway between true easements (*ante*, §§ 1237–1251) and public rights in respect of land, which are not the subject of this work. They differ from the former, in that they are not claimed in respect of a dominant tenement (which every true easement is), and are, probably, inalienable and inextinguishable, except by statute. They differ from public rights, because they are restricted to a definite local class, and can be directly enforced by individuals, without the co-operation of the Crown or the Attorney General. Courts of First Instance have held that customary rights are not within the Prescription Act, 1832; notwithstanding the express words of s. 2 (*Mounsey* v. *Ismay* (1865) 3 H. & C. 486). But this view has been questioned in the Court of Appeal (*Mercer* v. *Denne* [1905] 2 Ch., at p. 586).]

Must be reasonable

1302. Such a claim must be reasonable in its character and extent — i. e. it must not tend to the destruction of the servient tenement or of the owner's beneficial enjoyment thereof.

Millechamp v. *Johnson* (1746) Willes, 205 n.
Taylor v. *Devey* (1837) 7 A. & E. 409.
Tyson v. *Smith* (1838) 9 A. & E., at pp. 421–2, *per Curiam.*
Sowerby v. *Coleman* (1867) L. R. 2 Exch. 96.
Hall v. *Nottingham* (1875) 1 Ex. D., at p. 4, *per* Cleasby, B.

[It is on this ground that it has been held, that a claim by custom to a right in the nature of a profit *à prendre* is bad (*Sowerby* v. *Coleman*, *ubi sup.*, at p. 98). For examples of customary rights which have been regarded as reasonable, see Appendix to this Title.]

No abandonment

1303. Customary rights once proved to exist can only be abolished by Act of Parliament; but long continued non-user may be evidence against the alleged existence of such rights.

Hammerton v. *Honey* (1876) 24 W. R., at p. 604, *per* Jessel, M. R.

[*Scales* v. *Key* (1840) 11 A. & E. 819, sometimes quoted as inconsistent with the latter part of this §, was not a case of custom affecting rights over land.]

Addendum to Title X

The following customary rights of user of land have been supported by the Courts.

1. A right to draw water from a spring for domestic purposes, (Such a right is not in the nature of a profit *à prendre*.)

Race v. *Ward* (1853) 4 E. & B. 702.

2. A right of way.

Foxall v. *Venables* (1590) Cro. Eliz. 180.
Brocklebank v. *Thompson* [1903] 2 Ch. 344.

3. A right to play games and indulge in pastimes to a reasonable extent.

Abbot v. *Weekly* (1665) 1 Lev. 176 (dances).
Fitch v. *Rawling* (1795) 2 H. Bl. 393 (cricket).
Mounsey v. *Ismay* (1863) 1 H. & C. 729 (horse races).
Hall v. *Nottingham* (1875) 1 Ex. D. 1 (dances).

4. A right to take walking (? riding) exercise.

Abercromby v. *Fermoy Commrs.* [1900] 1 Ir. R. 302.

[A *jus spatiandi* cannot be acquired as a true easement (*International Tea Stores* v. *Hobbs* [1903] 2 Ch., at p. 172; *A. G.* v. *Antrobus* [1905] 2 Ch., at p. 198, *per* Farwell, J.).]

5. A right to deposit oysters or nets on the foreshore.

Truro Corporation v. *Rowe* [1901] 1 K. B. 870 (oysters).
Mercer v. *Denne* [1905] 2 Ch. 538 (nets).

6. A right to erect booths during a fair.

Tyson v. *Smith* (1838) 9 A. & E. 406.

[It may be doubted whether this right would, at the present day be recognized to the extent allowed in *Tyson* v. *Smith*. But it would probably be recognized in favour of a strictly limited class.]

7. A right to perambulate parish boundaries.

Goodday v. *Michell* (1595) Cro. Eliz. 441.
Taylor v. *Devey* (1837) 7 A. & E. 409.

[The customs by which the owner of a mill can compel the inhabitants of a district to bring their corn to be ground (*Cort* v. *Birkbeck* (1779) 1 Doug. 218; *Richardson* v. *Walker* (1824) 2 B. & C. 827), known in Scotland as "thirlage," and by which the inhabitants of a parish can compel the owner of the great tithes to keep a bull or boar for the use of the parish (*Launchbury* v. *Bode* [1898] 2 Ch. 120), cannot be properly classed as giving rise to customary rights of user of land, though they have a local operation.]

TITLE XI—EQUITABLE INTERESTS IN LAND

Equitable interest

1304. An equitable interest in land is a right to some advantage derived from a corporeal or incorporeal hereditament, the legal ownership of which is vested, wholly or partially, in some person or persons other than the person or persons having the equitable interest.

[Equitable interests arose, as is well known, from the desire to create interests in land which, while conferring all the profitable consequences of land-ownership, should be free from the onerous features attaching to the legal estate. Such a desire was wholly inconsistent with feudal principles, and was, accordingly, for long ignored by the common law courts. But, favoured by the powerful protection of the Court of Chancery, the 'use, trust, or confidence' of land (as the early equitable interests were called) rapidly established itself in practice; and its existence was clearly recognized by the legislature before the end of the fourteenth century (cf. 50 Edw. III (1376) c. 6). From that date, despite the steady refusal of the common law courts to recognize them, uses of land occupied more and more of the attention of Parliament, which, instead of attempting to repress them, at first contented itself with gradually assimilating them to legal estates (e. g. 15 Ric. II (1391) c. 5, s. 4 (Mortmain); 1 Ric. III (1483) c. 1 (Sale); 4 Hen. VII (1488) c. 17 (Wardship); and 19 Hen VII. (1503) c. 15 (Debts, Reliefs, Heriots, &c.)). Had this process been continued, the difference between the legal estate and the equitable interest would have gradually disappeared; but the exigencies of politics demanded a more drastic measure, and, in the year 1535, the Statute of Uses (27 Hen. VIII, c. 10) attempted to destroy equitable interests in land at a blow, by enacting (s. 1) that they should be deemed to be legal estates. As is well known, the statute in the end failed completely to effect this part of its object (if indeed its framers really had this

object in view). For the Court of Chancery, determined to preserve what had, in fact, become a national institution, ultimately enforced, as equitable interests, three classes of uses of land not 'executed' by the statute. These were — (i) uses of existing leaseholds (because no one could be 'seised' of a term of years), (ii) active uses, i. e. uses in which the feoffee, or legal owner, had active duties to perform, and (iii) 'uses upon uses,' i. e. uses limited out of previously created uses. All these are now, more commonly, called 'trusts'; but it is important to remember, that no technical words are necessary to express the idea of a fiduciary relation. Thus the institution of equitable interests recovered from what was at first thought to be a fatal blow, and indeed soon included interests protected by the Court of Chancery, but not created by way of trust, such as equities of redemption, and interests under contracts of sale and lease. Now that the onerous incidents attaching to the legal estate have largely disappeared, it has frequently been suggested that the separate existence of the equitable interest is unnecessary. But, in the absence of a system of hypothec, and a developed law of guardianship, it seems desirable to have some means by which married women, infants, and persons of unsound mind or feeble capacity, may derive maintenance from land, without being burdened with the cares of legal ownership.]

Classes of equitable interests

1305. Equitable interests in land may arise from:

(i) the limitation of any interest in land to a person or persons with the expressed or inferred intent that, or a declaration by the owner of any interest in land that, such interest shall be held in whole or in part for the benefit of some other person or persons (Trust);

(ii) the limitation of any interest in land to a person or persons to secure the payment of money or money's worth (Right or Equity of Redemption);

(iii) the making for value of a contract (express or implied) by the owner of any interest in land to transfer that interest or any less interest to another person;

(iv) the creation by testamentary disposition, or by means of an agreement (express or implied), for value, by the owner of an interest in land, of any charge thereon, in favour of another person;

(v) the negligent or fraudulent act of the owner of an interest in land, by reason whereof another person has reasonably believed himself to acquire, for valuable consideration, a legal interest in the land.

[In the above cases, (i) the person for whose benefit the limitation or declaration is made or deemed to be made, (ii) the person entitled to redeem the mortgaged property, (iii) the person who has contracted to acquire the interest, (iv) the person in whose favour the charge is agreed to be created, and (v) the person who has purchased in reliance on the conduct of the owner, are said to have equitable interests.]

Similarity of legal and equitable interests

1306. Generally speaking, as regards rules of inheritance,[a] limitation, and construction,[b] rules of validity and invalidity,[c] the varieties of interest which can be created,[d] the incidence of curtesy, dower, and other similar claims,[e] and the

liability for the debts of their owners,[f] equitable interests are subject to the same law as the corporeal or incorporeal hereditaments out of which they are limited.

(a) *Blunt* v. *Clark* (1657) 2 Sid. 61 (surrenderee of copyhold).
Blackburn v. *Graves* (1673) 1 Mod. 102 (do.).
Edwin v. *Thomas* (1687) 1 Vern. 489 (trust).
Fawcet v. *Lowther* (1751) 2 Ves. Sen., at p. 304, *per* Lord Hardwicke, C. (equity of redemption).
Trash v. *Wood* (1839) 4 My. & Cr. 324 (trust).
Re Hudson [1908] 1 Ch. 655 (trust).

[The exception from this rule is the case of the purely executory trust, which does not follow a special custom of descent (*Roberts* v. *Dixwell* (1738) 1 Atk. 607). An equitable interest in an incorporeal hereditament would be within the rule of the text; because the incorporeal hereditament itself would follow the descent of the servient tenement — at least where it issued out of the land (*Randall* v. *Jenkins* (1673) 1 Mod. 96; *Edwin* v. *Thomas*, *ubi sup.*, *per* Jeffreys, C.).]

(b) E. g. the Rule in Shelley's Case (*Richardson* v. *Harrison* (1885) 16 Q. B. D. 85). But here, again, executory trusts are an exception; if the result of applying the rule would be to defeat the settlor's intention (*Roberts* v. *Dixwell*, *ubi sup.*). Also the Rule of Merger (*ante*, § 1041) applies where both interests are equitable, by analogy to law (*Brandon* v. *Brandon* (1862) 31 L. J. Ch., at p. 49, *per* Kindersley, V. C.); but, in the case of equitable interests, the Court is even readier than where the interests are legal, to find reasons for preventing merger (*Whittle* v. *Henning* (1848) 2 Ph. 731).
Re Averill [1898] 1 Ch. 523 (class gifts).

(c) E. g. the Rule against Perpetuities (*Abbiss* v. *Burney* (1880) 17 Ch. D. 11), the so-called Rule against Double Possibilities (*Re Nash* [1910] 1 Ch. 1), the Rules against Accumulation (Accumulation Acts 1800 and 1892), the Rule against Mortmain and Charitable Uses (Mortmain Acts, 1888 and 1891).

(d) It is every day practice to create equitable interests in fee simple, fee tail, for life, or years, present and future, out of socage or copyhold estates. With regard to equitable interests of inheritance in copyholds, it may be noted that they pass under the Land Transfer Act, 1897, s. 1, to the personal representatives of a deceased owner (*Somervill's* and *Turner's Contract* [1903] 2 Ch. 583), while legal estates of inheritance in copyholds do not. An

equitable socage interest in tail may be barred in the same way as the corresponding legal estate (Fines and Recoveries Act, 1833, s. 1, *ante*, §§ 1057–1064); an equitable entail of copyholds may be barred in the same way, except that the disentailing deed must be entered on the rolls of the manor (Fines and Recoveries Act, 1833, s. 53). But it is even possible to create equitable interests which have no corresponding legal estates, e. g. a life interest in leaseholds (*Re Betty* [1899] 1 Ch. 821); though much the same result may also be produced by an absolute bequest of leaseholds with an executory limitation over after the death of the legatee (*Re Gjers* [1899] 2 Ch. 54). And in the latter case, at any rate if there is an express direction that he shall bear outgoings, acceptance of the bequest by the legatee "imposes in equity a personal obligation upon him" (*Re Loom* [1910] 2 Ch., at p. 233, *per* Parker, J.).

(e) *Sweetapple* v. *Bindon* (1705) 2 Vern. 536 (curtesy).
Otway v. *Hudson* (1706) *ibid.* 584 (free-bench).
Watts v. *Ball* (1709) 1 P. Wms. 108 (curtesy).
Vaughan v. *Atkyns* (1771) 5 Burr. 2764 (free-bench).
Dower Act, 1833, s. 2 (dower).

(f) Statute of Frauds (1677) s. 10.
Administration of Estates Act, 1833, s. 1.
Judgments Act, 1838, s. 11.
Solley v. *Gower* (1688) 2 Vern. 61.

[Some technical differences, however, exist with regard to the manner of enforcing the liability, e. g. an equity of redemption cannot be seized under an Elegit; though a receiver may be appointed.]

But: —

(i) there is no direct liability for incidents of tenure upon an equitable interest or the owner thereof;

Hall v. *Bromley* (1887) 35 Ch. D. 642.
Copestake v. *Hoper* [1908] 2 Ch. 10.

[As to escheat, see *post*, § 1307.]

(ii) an equitable contingent remainder cannot fail by reason of the determination of the particular estate before the contingency happens.

Abbiss v. *Burney* (1880) 17 Ch. D. 211.

'Escheat' of equitable interest

1307. Where, after the 14th August, 1884, a person has died without heir and intestate in respect of any real estate consisting of an equitable interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, such equitable interest will pass to the Crown.

Intestates' Estates Act, 1884, s. 4.

[An equitable interest in leaseholds or other personal property would, in corresponding circumstances, pass to the Crown as *bona vacantia* (*Middleton* v. *Spicer* (1783) 1 Bro. C. C. 201; *Re Gosman* (1880) 15 Ch. D. 67).]

Merger in legal estate

1308. Where the legal estate and a co-extensive and commensurate equitable interest in the same land become vested in the same person in the same right, the equitable interest is merged or extinguished in the legal estate.

Brydges v. *Brydges* (1796) 3 Ves. at p. 126, *per* Lord Alvanley, M. R.
Selby v. *Alston* (1797) *ibid.* 336.
Re Douglas (1884) 28 Ch. D. 327.
Re Selous [1901] 1 Ch. 921.

No technical words necessary

1309. No technical words are necessary, even in a conveyance *inter vivos*, for the limitation of an equitable interest of inheritance.[a] But, in order that such an estate may pass by a conveyance *inter vivos*, it must be evident from the circumstances, or the

expressions used, that such was the intention of the conveying party.[b]

(a) *Re Tringham* [1904] 2 Ch. 487.
Re Oliver's Settlement [1905] 1 Ch. 191.
(b) *Whiston's Settlement* [1894] 1 Ch. 661.
Re Irwin [1904] 2 Ch. 752.
Re Thursby's Settlement [1910] 2 Ch. at p. 188, *per* Farwell, L. J.

[In *Re Irwin*, *ubi sup.*, the Court suggested as evidence of intention to pass an interest of inheritance (in addition to actual expressions in the conveyance), — (i) a reference to other property disposed of absolutely, (ii) the giving of valuable consideration by the purchaser.]

No right of possession

1310. The owner of a present equitable interest is not entitled as of right to possession of the land, or the custody of the title deeds. But he may be put into possession of the land, and allowed the custody of the title deeds, at the discretion of the Court.

Re Burnaby's Settled Estates (1889) 42 Ch. D. 621.
Re Wythes [1893] 2 Ch. 369.
Re Bogot [1894] 1 Ch. 177.
Re Newen [1894] 2 Ch. 297.
Re Richardson [1900] 2 Ch. 778.

[The Court has been much more inclined to exercise its discretion in favour of the equitable owner since the passing of the Settled Land Acts (*Re Richardson*, *ubi sup.*,) at p. 785, *per* Stirling, J.).]

No power to affect legal estate

1311. The owner of an equitable interest cannot, except under statutory powers, make any disposition affecting the legal estate in the land.

Corbett v. *Plowden* (1884) 25 Ch. D. 678.
Keith v. *Garcia & Co.* [1904] 1 Ch. 774. (This case shows, however,

that the owners of the legal estate may by conduct adopt the disposition by the equitable owner, and thus make it binding on themselves.)

[Well-known statutory exceptions are (i) the Conveyancing Act, 1881, s. 18, conferring certain powers of leasing on a mortgagor in possession, (ii) the Settled Land Acts, 1882 to 1890, conferring large powers of disposition upon equitable limited owners, and (iii) the Agricultural Holdings Act, 1908, s. 12, entitling the tenant of a mortgagor to claim, as against a mortgagee who has taken possession of the land, six months' notice of termination of the tenancy, and other rights. These have been, or will be, treated of in their appropriate places. With regard to the powers of the equitable owner to take proceedings for recovery of possession of the land, see *ante*, Bk. II, Pt. III, § 825 (n.).]

Patronage

1312. Subject to express statutory provisions, if an interest which consists of or confers a right of patronage is legally vested in one person and equitably vested in another, the right of patronage must be exercised by the legal owner, but according to the wishes of the equitable owner.

Amherst v. *Dawling* (1700) 2 Vern. 401 (advowson).
Hill v. *B. of London* (1738) 1 Atk. 618 (do.).
Mackensie v. *Robinson* (1747) 3 Atk. 559 (do.).
Barret v. *Glubb* (1776) 2 W. Bl., at p. 1053, *per* Grey, C. J. (do.).
Mott v. *Buxton* (1802) 7 Ves. 201 (stewardship of manor).
A. G. v. *Forster* (1804) 10 Ves., at p. 338, *per* Lord Eldon, C. (advowson).

Invalid against a legal purchaser for value

1313. Subject to § 1321, no equitable interest, even though prior in point of date, can be enforced against any *bonâ fide* purchaser for value of an interest in the land in whom the legal estate, [a] or the best

right to call for it,[b] is vested. For the purposes of this §, and §§ 1314, 1315, 1320, "value" means executed, but not executory, consideration.[c]

(a) *Millard's Case* (1678) 2 Freem. 43.
Mansell v. *Mansell* (1732) 2 P. Wms., at p. 681, *per Curiam.*
Willoughby v. *Willoughby* (1787) 1 T. R., at p. 771, *per* Lord Hardwicke, C.
Pilcher v. *Rawlins* (1872) L. R. 7 Ch. App. 260.
(b) *Wilmot* v. *Pike* (1845) 5 Ha. 14 (express declaration of trust).
Hunter v. *Walters* (1871) 41 L. J. Ch. 175 (covenant to convey).
(c) *Hardingham* v. *Nicholls* (1745) 3 Atk. 304.

[*Pilcher* v. *Rawlins* admirably illustrates the extreme strictness of this rule; for in that case the purchaser of the legal estate was unaware that he was acquiring it, and, if his belief as to the state of the title had been well-founded, he would not have acquired it. There is said, however, to be an exception from the rule in the case of a purchaser without notice from a purchaser who acquired with notice of a charitable trust (*East Greensted Case* (1633) Duke, 65; *Sutton Colefield Case* (1634) *ibid.* 68; *Commissioners of Donations* v. *Wybrants* (1845) 2 Jo. & La., at p. 198, *per* Sugden, L. C. I.)].

Definition of bonâ fide purchaser

1314. For the purposes of § 1313 a *bonâ fide* purchaser for value means a person who has acquired an interest in the land, for value, without having, at the time when he gave the value, any notice (express, implied, or imputed) of the existence of the equitable interest which it is sought to enforce against him.[a] It is immaterial, for the purposes of this rule, that such purchaser became aware of the existence of such equitable interest before he actually acquired the legal estate, or the right to call for it;[b] provided that he acquired such legal estate or right

without causing or participating in a breach of trust as against the owner of the equitable interest.[c]

(a) *Le Neve* v. *Le Neve* (1747) 1 Ambl. 436.
Pilcher v. *Rawlins, ubi sup.*
(b) *Brace* v. *Duchess of Marlborough* (1728) 2 P. Wms. 491.
Bailey v. *Barnes* [1894] 1 Ch. 25.

[These cases show that the legal estate may even be acquired *pendente lite*.]

(c) *Mumford* v. *Stobwasser* (1874) L. R. 18 Eq. 556 (agreement to grant an underlease).
Taylor v. *Russell* [1892] A. C. 244. (This case shows that an unsatisfied mortgagee is not a trustee for this purpose.)
Perham v. *Kempster* [1907] 1 Ch. 373.

[It is doubtful whether the purchaser will be postponed to the equitable interest as participating in the breach of trust, if he was unaware that a breach of trust was being committed. In *Mumford* v. *Stobwasser, ubi sup.*, Jessel, M. R., seemed to think that he would; but see the cautious expressions of Lindley, L. J., in *Bailey* v. *Barnes, ubi sup.*, at p. 37.]

Sub-purchaser

1315. A person who purchases for value the legal estate from a *bonâ fide* purchaser, as defined in § 1314, is also protected against a prior equitable interest, even though the second purchaser had notice of such equitable interest when he purchased; provided that such second purchaser was not himself a party to a fraud or breach of trust committed against the owner of the equitable interest.

Lowther v. *Carlton* (1740) Barn. Ch. 359.
Sweet v. *Southcote* (1786) 2 Bro. C. C. 66.
Wilkes v. *Spooner* [1911] 2 K. B. 473.

[This rule applies even where the owner of the equitable interest is a charity (*East Greensted Case* (1633) Duke, 64 (3); *Sutton Cole-*

field Case (1634), *ibid.*, 68). *Quære:* Is a volunteer, taking, with or without notice, from a purchaser without notice, in a similar position?]

Notice

1316. A purchaser has express notice, for the purposes of § 1314, of an equitable interest, if, at the time when value was given by him, he was in fact aware of the existence of such interest. He has implied (or constructive) notice of such interest, if he would have discovered its existence, had such inquiries and inspections been made as ought reasonably to have been made by him. He has imputed notice of such interest, if, in the same transaction, such notice in fact came to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Conveyancing Act, 1882, s. 3.

Inquiries

1317. The inquiries and inspections referred to in § 1317 include: —

(i) an investigation of the title to the property purchased, for the proper period, i. e. forty years prior to the date of the contract to purchase;

Re Cox and Neve [1891] 2 Ch. 109.
Nisbet's and Potts' Contract [1906] 1 Ch. 386.

[And the fact that the purchaser was precluded, as against the vendor, by contract, or even by statute, from investigating for such period, is immaterial for this purpose (*Imray* v. *Oakshette* [1897] 2 Q. B., at p. 229, *per* Rigby, L. J.).]

(ii) an inspection of the land itself;

Hunt v. *Luck* [1902] 1 Ch.

[Generally speaking, a purchaser has constructive notice of the claims of all persons in possession, but not of their lessor's claims (*Hunt* v. *Luck*, *ubi sup.*, at p. 432, *per* Vaughan Williams, L. J.; *Green* v. *Rheinberg* (1911) 104 L. T. 149).]

(iii) an examination of the title deeds.

Worthington v. *Morgan* (1849) 16 Sim. 547.
Oliver v. *Hinton* [1899] 2 Ch. 264.

[But excessive precautions are not required; e. g. the fact that the mortgagee is the mortgagor's solicitor does not make it the duty of a purchaser from the mortgagee to make special inquiries as to whether the mortgage has been paid off (*Powell* v. *Browne* (1908) 97 L. T. 854).]

Mortgagor paying off

1318. The owner of an equity of redemption who repays part of the mortgage money, is not affected with notice of facts which he would have discovered had he investigated the mortgagee's title, when he made such partial repayment.

Berwick & Co. v. *Price* [1905] 1 Ch. 632.

Priority among equitable interests

1319. Subject to § 1313, equitable interests rank *inter se* in order of the date of their creation.[a] But fraud or negligence on the part of the owner of a

prior equitable interest will cause him to be postponed to the owner of a later; if the owner of the later interest, being a *bonâ fide* purchaser for value, has been induced to acquire his interest by means of such fraud or negligence.[b]

(a) *Thorpe* v. *Holdsworth* (1868) L. R. 7 Eq. 139.
Walker v. *Linom* [1907] 2 Ch., at p. 114, *per* Parker, J.
(b) *Rice* v. *Rice* (1853) 2 Drew, 73.
Layard v. *Maud* (1867) L. R. 4 Eq. 397.

[The rule in *Dearle* v. *Hall* (1825) 3 Russ. 1, which requires purchasers of equitable interests in chattels personal to give notice to the owners of the legal interest, on pain of losing priority over subsequent purchasers, has no application to equitable interests in land (*Union Bank of London* v. *Kent* (1888) 39 Ch. D., at p. 245, *per* Cotton, L. J.; *Taylor* v. *L. & County Bank* [1901] 2 Ch. 231). But an interest in the proceeds of the sale of land settled upon trust for sale is personalty within the rule in *Dearle* v. *Hall* (*Lloyd's Bank* v. *Pearson* [1901] 1 Ch. 865).]

Title deeds

1320. The owner of a legal estate can recover the title deeds of such estate from a *bonâ fide* purchaser for value of an equitable interest who had no notice of such legal estate when he gave value.[a] But the Court will not deprive the latter of the title deeds in favour of the owner of a prior equitable interest.[b]

(a) *Re Ingham* [1893] 1 Ch. 352.
(b) *Thorpe* v. *Holdsworth* (1868) L. R. 7 Eq. 139. (But see *Newton* v. *Newton* (1868) L. R. 4 Ch. App. 143.)

Postponement of legal estate

1321. A legal estate will also be postponed to an equitable interest inconsistent therewith, notwithstanding that the creation of the latter was subsequent to

the acquisition of the legal estate; if, by reason of the fraud[a] or negligence[b] of the owner of the legal estate, the equitable interest has been created in favour of, or has been acquired by, a *bonâ fide* purchaser for value without notice of the existence of the legal estate.

(a) *Thatched House Case* (1716) 1 Eq. Ca. Ab., at p. 322, *per* Lord Cowper, C.
Anon., quoted by Lord Hardwicke, C., in *Arnot* v. *Biscoe*, (1748), 1 Ves. Sen., at p. 96.
Evans v. *Bicknell* (1801) 6 Ves., at p. 192, *per* Lord Eldon, C.
Barnett v. *Weston* (1806) 12 Ves., at p. 133, *per* Sir W. Grant, M. R.
Northern Counties Insurance Co. v. *Whipp* (1884) 26 Ch. D. 482.

(b) *Perry-Herrick* v. *Attwood* (1857) 2 De G. & J. 21.
Briggs v. *Jones* (1870) L. R. 10 Eq. 92.
Clarke v. *Palmer* (1882) 21 Ch. D. 124.
Lloyds Banking Co. v. *Jones* (1885) 29 Ch. D. 221.
Walker v. *Linom* [1907] 2 Ch. 104.

TITLE XII — TENANCIES AT SUFFERANCE AND ADVERSE POSSESSION

Tenant at sufferance

1322. A tenant at sufferance is a person who, having lawfully entered upon land in pursuance of a title by act of the parties,[a] continues in possession thereof after his title has expired, without claim of right, and without the agreement of the person entitled to possession.[b] There cannot be a tenant at sufferance of the Crown.[c]

(a) E. g. if a guardian in socage holds over after his ward comes of age, he is a mere trespasser (Co. Litt. 57 b.).

(b) Co. Litt. 57 b.
Zouche's Case (1543) Dyer, 57 b.
Anon. (1571) Owen, 35. (In this case it was suggested that a tenant *pur autre vie* holding over was not a tenant at sufferance, but an intruder. See, however, the next two cases.)
Rouse's Case (1587) Owen, 27.
Allen v. *Hill* (1590) Cro. Eliz. 238.
Geary v. *Bearcroft* (1666) Cart., at p. 66, *per* Bridgman, C. J.
Thomasin v. *Mackworth* (1666) *ibid.*, at p. 78, *per eundem.*
Smartle v. *Williams* (1694) 1 Salk., at p. 246, *per* Holt, C. J.

(c) *Sir Moil Finch's Case* (1590–1) 2 Leon., at p. 143, *per* Clark, B.

No profits

1323. A tenant at sufferance has no right to the profits of the land;[a] but he cannot be treated as a trespasser.[b] *Semble*, he may bring Trespass against a mere stranger.[c]

(a) *Anon.* (1502) Keilw. 47 a, *per* Frowike, C. J.
Pike v. *Harsen* (1591) 3 Leon. 233, *per* Wray, C. J.
Bennett v. *Turner* (1841) 7 M. & W., at p. 235, *per* Parke, B.

(b) Co. Litt. 57 b.
Rouse's Case (1587) Owen, 28, *per Curiam.*
Trevillian v. *Andrew* (1697) 5 Mod. 384.

(e) There seems to be a little doubt on this point. In *Rouse's Case, ubi sup.* (also reported 2 Leon. 45), the Court was divided in opinion whether a tenant at sufferance could justify distraining the beasts of a stranger damage feasants. And it was said in *Preston* v. *Love* (n. d.) Noy, 120, that the reversioner might lease to another without entry on the tenant at sufferance; "for it is not out of his possession." But the report is bad.

No power of alienation

1324. If a tenant at sufferance attempts to dispose of his interest, or to create estates out of it, his possession becomes adverse.

Rouse's Case, ubi sup., at p. 28, *per totam Curiam.*

[This rule was of great importance before 1833 (Real Property Limitation Act, 1833, s. 39); owing to the effect produced on the claims of rightful owners by a 'descent cast,' i. e. the transmission of a tortious fee, gained by disseisin, to the heir of the disseisor (*Anon.* (1571) Owen, 35). And, even now, the point is important; regard being had to the great unwillingness of the Courts to allow a title by adverse possession to be claimed by a lessee against his lessor (*Archbold* v. *Scully* (1861) 9 H. L. C., at p. 375, *per* Lord Cranworth; *Walter* v. *Yalden* [1902] 2 K. B. 304, and *post*, § 1329).]

Use and occupation

1325. No rent can be claimed, as such, from a tenant at sufferance; [a] but an action for use and occupation will lie against him.[b] If the person entitled to possession accepts rent, as such, from a tenant at sufferance, the latter becomes a tenant at will.[c]

(a) *Anon.* (n. d.) 1 Brownl. 30.
Whitgift v. *Barrington* (1622) Winch, at p. 32, *per* Winch, J.

(b) *Bromefield* v. *Williamson* (1654) Sty. 407.
Bayley v. *Bradley* (1848) 5 C. B. 396.
Leigh v. *Dickeson* (1884) 15 Q. B. D. 60. (But only by waiving the tort, and, therefore, only up to the date of notice in ejectment (*Birch* v. *Wright* (1786) 1 T. R., at p. 387, *per* Buller, J.).)

[This rule, about which there is some little doubt, has lost much of its importance by the passing of the Landlord and Tenant Act, 1730, s. 1, which provides the superior remedy described in the next §. But there may be some cases which do not fall within the statute.]

(c) *Anon.* (1573) 4 Leon. 35.
Green's and Moody's Case (1627) Godb. 384.
Taylor v. *Seed* (1696) Comb. 383.

[If the tenant claims an interest for a specific number of years, acceptance of rent admits his claim (*Green's and Moody's Case, ubi sup.*, subject, however, now, presumably, to the Statute of Frauds (1677), s. 1).]

Holding over

1326. Any tenant for term of life, lives, or years, or any person coming into possession through such tenant, who wilfully holds over any land after the determination of such term, and after demand of possession and notice in writing by the person entitled to possession, or his agent, is liable to pay double the yearly value of such land to the person so kept out of possession, for so long as such land is detained.

Landlord and Tenant Act, 1730, s. 1.

Liability for damage

1327. A tenant at sufferance is liable to the person entitled to possession of the premises for all damage done by him to the premises; but (*semble*) not for permissive waste.

West v. *Treude* (1630) Cro. Car. 187. (But this was more like a tenancy at will.)

Adverse possession

1328. A person who takes possession of land, claiming to hold it as his own, acquires an interest valid as against all persons other than those legally entitled, mediately or immediately, to possession.[a] Possession is *primâ facie* evidence of seisin in fee simple absolute [b] (*ante*, § 1048).

(a) *Asher* v. *Whitlock* (1865) L. R. 1 Q. B. 1.
Perry v. *Clissold* [1907] A. C. 73.
(b) *Wallwyn* v. *Lee* (1803) 9 Ves., at p. 31, *per* Lord Eldon, C.
Peaceable v. *Watson* (1811) 4 Taunt. 16.
Doe v. *Penfold* (1838) 8 C. & P. 536.
Busher v. *Thompson* (1846) 4 C. B., at p. 59, *per* Coltman, J.
Asher v. *Whitlock*, *ubi sup.*, at p. 6, *per* Mellor, J.

Statutes of Limitation

1329. For the purposes of the Statutes of Limitation, the possession of a person who claims under a lease is not adverse to the lessor during the existence of the term; even though no rent is paid and no acknowledgment given by the person in possession.[a] And a person who acquires possession against a lessee, does not acquire adverse possession against the lessor, until the expiry of the lease; even though no rent is paid or acknowledgment given by such person.[b] But the possession of a tenant at will becomes adverse to his lessor either at the actual determination of his tenancy, or at the expiration of one year from the commencement thereof (whichever first happens).[c]

(a) *Archbold* v. *Scully* (1861) 9 H. L. C., at p. 375, *per* Lord Cranworth.

(b) Real Property Limitation Act, 1874, s. 2.
Walter v. *Yalden* [1902] 2 K. B. 304. (This case is very strong; because the owner of the term had surrendered it to the lessor more than twelve years before the action was brought. *Quære:* whether this is consistent with the words of the section.)

[It would seem that a similar doctrine as to copyholds and the lord of the manor might be deduced from *Ecclesiastical Commissioners* v. *Parr* [1894] 2 Q. B. 420.]

(c) Real Property Limitation Act, 1833, s. 7. (The words within brackets are not in the Act.)

Liabilities of adverse possessor

1330. A person who takes possession of land without title is subject to all liabilities, legal and equitable, which affected the estate of the owner at the time when adverse possession was acquired; and all persons claiming under him are similarly subject, except that, as regards equitable liabilities, the defence of *bonâ fide* purchaser for value (*ante*, § 1314) may be pleaded by them.

Nisbet's and Potts' Contract [1906] 1 Ch. 386.

Possession must be effective

1331. Possession without title, to be adverse, must be effective in respect of all parts of the land in respect of which it is claimed to be adverse.

Ashton v. *Stock* (1877) 6 Ch. D. 719.
Thompson v. *Hickman* [1907] 1 Ch. 550.
Glyn v. *Howell* [1909] 1 Ch. 666.

[The judgments in the first two cases appear to lay it down, but without stating reasons, that mere wrongful working of minerals can never confer a title by possession. But this doctrine seems to be quite inconsistent with the decision in the last case.]

Transfer of adverse possession

1332. Adverse possession may be transferred and transmitted, both before as well as after the right of the owner or former owner is barred by lapse of time, in the same manner as a lawful estate.[a] But if a person holding possession without title abandons such possession, the statutory period of limitation will cease to run against the owner, and will recommence *de novo* on the taking of possession by another adverse possessor.[b]

(a) *Goody* v. *Carter* (1847) 9 Q. B. 863.
Asher v. *Whitlock* (1865) L. R. 1 Q. B. 1.
Nisbet's and Potts' Contract [1906] 1 Ch. 386.
(b) *Trustees' & Exors' Co.* v. *Short* (1888) L. R. 13 App. Ca. 793 (P. C.).

Mesne profits

1333. A person who takes and holds possession of land without title, whether he acted in good faith or not, is liable, on ejectment by the person entitled to possession, to account for the mesne profits (*ante*, Bk. I, §§ 45, 46) arising during his possession. But if he has acted reasonably and in good faith, he will be allowed credit for all necessary expenses incurred in taking such profits.

Goodtitle v. *Tombs* (1770) 3 Wils. 118.
Martin v. *Power* (1839) 5 M. & W. 351.
Jegon v. *Vivian* (1871) L. R. 6 Ch. App. 742.
Ashton v. *Stock* (1877) 6 Ch. D. 719.

[*Jegon* v. *Vivian* shows, that the fact that the defendant knew that there was a doubt on the title, does not prevent him claiming the allowance of expenses on the ground of *bona fides*. *Quære:* does

the main doctrine of the § apply to anything except a trespass? Certainly under the old law mesne profits could not be recovered in Ejectment, but only by a supplementary action of Trespass. See, however, the reasons given for this peculiarity by Wilmot, C. J., in *Goodtitle* v. *Tombs*, *ubi sup.*]

SECTION II

RIGHTS AND LIABILITIES OF OCCUPIERS OF LAND

TITLE I—AS REGARDS THE PUBLIC

Rights of occupier

1334. As between himself and the public, and the occupiers of other land generally (whether neighbours or not), the occupier of land may, subject to the provisions of this Title, and to any special rights acquired by the public or the Crown or any person, under Act of Parliament, charter, dedication, grant, custom, or other lawful title, deal with the land in any way which does not create a nuisance (*ante*, Bk. II, Part III, Sect. II, Tit. I). In particular:—

(i) he has the exclusive right to the possession of the land, and the remedies for interference therewith specified in Bk. II, Pt. III, Sect. II, Tit. I (Trespass to Land);

(ii) he has the exclusive right to catch, kill, and appropriate all animals *feræ naturæ* being on the land, which are fit for the food of man;

Hannam v. *Mockett* (1824) 2 B. & C. 934.
Blades v. *Higgs* (1865) 11 H. L. C., at p. 631, *per* Lord Westbury, C.

[Such animals, if killed on the land by a trespasser, or otherwise unlawfully, become at once the property of the occupier (*Sutton* v.

Moody (1697) 1 Ld. Raym. 250; *Blades* v. *Higgs*, *ubi sup.*, at p. 632). There seems to be no authority as to the title to other wild animals improperly killed on the land. But, of course, in most cases such killing would involve a trespass.]

(iii) he cannot bring an action merely for frightening away wild animals, not being fit for food,[a] nor for enticing away game;[b] but he can bring an action for frightening away game from the land;[c]

(a) *Hannam* v. *Mockett*, *ubi sup.*
(b) *Ibbotson* v. *Peat* (1865) 3 H. & C., at p. 650, *per* Bramwell, B.
(c) *Ibbotson* v. *Peat*, *ubi sup.*

(iv) he has (*semble*) property in, or at least possession of, the young of wild birds hatched on the land, so long as they remain incapable of flight;

Bishop of London's Case (1522) Y. B. 14 Hen. VIII Mich. pl. 1, *per* Pollard, J.
Case of Swans (1592) 7 Rep., at 17 b.

(v) he may (*semble*) destroy domesticated animals unlawfully coming upon the land, in the circumstances specified in § 785, *ante*;

Bk. II, Pt. III, Sect. I, Tit. I.

(vi) he has the exclusive right to fish in any non-tidal water flowing over the land;

Blower v. *Ellis* (1886) 50 J. P. 326.
Mickletbwait v. *Vincent* (1892) 67 L. T. 225.

(vii) he has the right to take and use, to a reasonable extent, the water of any natural stream flowing in a defined channel past

or over (? or under) the land, whether such taking prejudicially affects the enjoyment of other persons or not, and for this purpose to have the water maintained in its natural condition and purity; [a] and also to have the natural flow of the water free from interference by the act of any other person, not being a riparian occupier exercising the right immediately above described; [b]

(a) *Miner* v. *Gilmour* (1858) 12 Moo. P. C. at p. 156, *per* Lord Kingsdown.
Young & Co. v. *Bankier Distillery Co.* [1893] A. C. 491.
Jones v. *Llanwrwst U. C.* [1911] 1 Ch. 393.
(b) *Fear* v. *Vickers* (1911) XXVII T. L. R. 558 (C. A.).

(viii) he has the right to abstract all water flowing over [a] or through [b] the land in undefined channels, whether such abstraction prejudicially affects other persons or not;

(a) *Rawstron* v. *Taylor* (1855) 11 Exch. 369.
Broadbent v. *Ramsbotham* (1856) *ibid.* 602.
(b) *Popplewell* v. *Hodkinson* (1869) L. R. 4 Ex. 249.
English v. *Metro. Water Board* [1907] 1 K. B. 588.

[On the other hand, an occupier of land is not entitled, by draining silt from his soil, to deprive the soil of another of its natural support (*Jordeson* v. *Sutton Gas Co.* [1899] 2 Ch. 217).]

(ix) he has the exclusive right of working and carrying away all minerals in the land, [a] and the right to the possession of all objects found on or in the land, whose

owners cannot be identified,[b] except (*semble*) such as are found on land to which the public has access;[c]

(a) *Keyse* v. *Powell* (1853) 2 E. & B. 132.
Ashton v. *Stock* (1877) 6 Ch. D. 719.
(b) *South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q. B. 44.
(c) *Bridges* v. *Hawkesworth* (1851) 21 L. J. Q. B. 75.

(x) he is entitled to protect his land against any reasonably apprehended danger, not being caused by his own act or unlawful omission, even though the result of such protection is to cause loss to other persons.

R. v. *Fagham Commissioners* (1828) 8 B. & C. 355 (sea).
Nield v. *L. & N. W. R.* (1874) L. R. 10 Ex. 4 (flood water).
Greyvensteyn v. *Hattingh* [1911] A. C. 355 (locusts) (P. C.).

[This right does not include the right to divert or impede the course of a natural stream (*Menzies* v. *Breadalbane* (1828) 3 Bligh, N. S. 414), nor the right to divert mischievous substances, which have actually reached the land, on to the land of another person. (*Whalley* v. *L. & Y. Ry. Co.* (1884) 13 Q. B. D. 131).]

Access to public way, or sea

1335. The occupier of land abutting on a public way (whether a road or path,[a] a river,[b] or a lake),[c] or on the sea,[d] has a right of free access from the land to the way or sea, and from the way or sea to the land. If this access is interfered with, the occupier has a right of action for damages;[e] but it is doubtful whether a mere interference with the resort of

customers to the land by the way or sea, gives the occupier a right of action.

(a) *St. Mary Newington* v. *Jacobs* (1871) L. R. 7 Q. B. 47.
Benjamin v. *Storr* (1874) L. R. 9 C. P. 400.
Fritz v. *Hobson* (1880) 14 Ch. D. 542.
(b) *Rose* v. *Groves* (1843) 5 Man. & G. 613.
D. of Buccleuch v. *Metro. B. W.* (1871) L. R. 5 H. L., at p. 463, *per* Lord Cairns.
Lyon v. *Fishmongers' Co.* (1876) L. R. 1 App. Ca. 662.
Hindson v. *Ashby* [1896] 2 Ch. 1.
(c) *Marshall* v. *Ulleswater Steam Navigation Co.* (1871) L. R. 7 Q. B., at p. 172, *per* Blackburn, J.
(d) *A. G.* v. *Wemyss* (1888) L. R. 13 App. Ca. 192.
Mellor v. *Walmesley* [1905] 2 Ch., at p. 175, *per* Stirling, L. J.

[These cases show, that the right of access is not destroyed by the fact that, owing to the action of the water, a strip of land is left dry between the occupier's boundary and the water. Care must be taken to distinguish between the right of the occupier, as a member of the public, to use the way, and his private right, as an occupier, to have access to it (*A. G.* v. *Thames Conservators* (1862) 1 H. & M. at p. 32, *per* Wood, V. C.; *Chaplin & Co. Ltd.* v. *Westr. Corpn.* [1901] 2 Ch. 329).]

(e) *Rose* v. *Groves, ubi sup.* (special damage need not be proved).
(f) *Wilkes* v. *Hungerford Market Co.* (1835) 2 Bing. N. C. 281. } (aff.).
Rose v. *Groves, ubi sup.* }
Ricket v. *Metro. Ry. Co.* (1867) L. R. 2 H. L., at p. 188. } (diss.).
Beckett v. *M. R. Co.* (1867) L. R. 1 C. P., at p. 100. }

1336. The occupier of land is liable to be restrained by injunction at the suit of the Crown, if he attempts to remove a barrier which protects other land from the inroads of the sea. *May not remove barrier against sea*

A. G. v. *Tomline* (1880) 14 Ch. D. 58.

Liability for defects

1337. The occupier of land is liable in respect of damage suffered by persons coming upon the land, in consequence of defects or dangers in or upon the premises, to the extent specified in § 731 (iii), *ante*.

Bk. II, Pt. III, Sect. I. Tit. I.

Fences

1338. The occupier of land is not bound to fence against the public; even where the land adjoins a highway.[a] But, if he does not, he is not entitled to claim damages for injury committed to the land by domesticated animals being lawfully upon the highway, which stray on to the land.[b]

(a) *Cornwell* v. *Metro. Commrs.* (1855) 10 Exch., at p. 773, *per* Pollock, C. B.
Hardcastle v. *S. Y. Ry. Co.* (1859) 4 H. & N. 67.
Binks v. *S. Y. Ry. Co.* (1862) 3 B. & S. 244.
Cox v. *Burbidge* (1863) 13 C. B. N. S. 430.
Ellis v. *Banyard* (1911) XXVIII T. L. R. 122.

[But see the concluding remarks of Vaughan Williams, L. J., in the last case.]

(b) Bk. II, Pt. III, Sect. I, Tit. V, § 779.

Dangerous substances

1339. An occupier of land is not responsible for injury caused by dangerous substances naturally growing on the land to (persons or) animals unlawfully coming on the land.[a] But an occupier of land who brings and keeps thereon dangerous animals or substances which escape and cause injury, is

liable to the persons injured to the extent specified in § 852.[b]

(a) *Ponting* v. *Noakes* [1894] 2 Q. B. 281.
(b) *Ante*, Bk. II. Pt. III. Sect. II, Tit. I.

Traps and spring guns

1340. An occupier of land who sets traps or spring guns on the land (even with a view of protecting it from trespassers) without giving notice of the existence of such instruments, is liable for any injuries suffered by persons or animals, whether trespassers or not, in consequence of such setting.[a] And an occupier of land who baits such traps in such a manner as to attract dogs (? other animals) on to the land, is liable to the owners of such dogs (? other animals) for any consequent injuries suffered by them.[b]

(a) *Deane* v. *Clayton* (1817) 7 Taunt. 489 (Court equally divided).
Ilott v. *Wilkes* (1820) 3 B. & Ald. 304 (notice).
Bird v. *Holbrook* (1828) 4 Bing. 628.
Jordin v. *Crump* (1841) 8 M. & W. 782 (notice).

[The common law rule does not seem to be affected by the existence of legislation making it a criminal offence to set engines dangerous to human life or limb (Offences Against the Person Act, 1861, s. 31); for *Jordin* v. *Crump* was decided after such legislation came into force by the 7 & 8 Geo. IV (1827) c. 18, s. 1.]

(b) *Townsend* v. *Wathen* (1808) 9 East, 277.

Fire

1341. An occupier of land is liable for all damage done by the escape of fire which he has lit, or

caused to be lit, or negligently produced, on the land.[a] But he is not liable for damage caused by the escape of a fire which accidentally begins on the land.[b]

(a) *Tubervil* v. *Stamp* (1697) 1 Salk. 13.
Vaughan v. *Menlove* (1837) 3 Bing. N. C. 468.
Filliter v. *Phippard* (1847) 11 Q. B. 347.

(b) Fires Prevention (Metropolis) Act, 1774, s. 186. (This clause is not confined in its operation to the Metropolis (*Richards* v. *Easto* (1846) 15 M. & W. 244).)

[In *Filliter* v. *Phippard*, *ubi sup.*, at p. 357, Lord Denman, C. J., criticising Blackstone's contrary view (*Comm.* I, 431), points out, that no fire can be said to 'begin accidentally' which is lit by the defendant or by his orders. It was formerly held, that a railway company, having express statutory powers to run locomotives, was not liable, apart from negligence, for damage caused by sparks from such locomotives (*Vaughan* v. *Taff Vale Ry. Co.* (1860) 5 H. & N. 679). But this rule has been altered, so far as regards claims not exceeding £100 for damage to agricultural land or crops, by the Railway Fires Act, 1905, s. 1.]

TITLE II — AS REGARDS NEIGHBOURS

1342. Land may be divided, for legal purposes, vertically or horizontally. *Division of land*

[The general proposition needs no authority; but it may be pointed out, that the horizontal division may be made above the surface as well as below it, e. g. in the case of separate ownership of flats or chambers in a large block, or even of an air space (*Reilly* v. *Booth* (1890) 44 Ch. D. 12).]

1343. There is a presumption that the occupier of the surface of land is also occupier of the sub-soil to an unlimited depth. *Presumption of occupation*

Keyse v. *Powell* (1853) 2 E. & B., at p. 144, *per Curiam*.
Seddon v. *Smith* (1877) 36 L. T. 168.

[But the presumption may be rebutted by circumstances, e. g. when a street or road is vested by statute in a public authority, so much only of the actual soil is vested as may be necessary for the purpose of preserving and maintaining and using it as a street or road; and it is sometimes extremely difficult to tell how far down the rights of the public authority extend (*Tunbridge Wells* v. *Baird* [1896] A. C. 434). And the presumption has no application as between landlord and tenant for years (*Elwes* v. *Brigg Gas Co.* (1886) 33 Ch. D. 562, and *ante*, § 1138).]

1344. When lands in the occupation of different persons are divided by a non-tidal river [a] or a road [b] *Boundaries*

(whether public or private), the presumption is that the boundary between them is, as regards the sub-soil, the *medium filum* of the river or road.

(a) *Bickett* v. *Morris* (1866) L. R. 1 H. L. (Sc.) 47.
Blount v. *Layard* (1888) [1891] 2 Ch., at p. 1689 n, *per* Bowen, L. J.

[Neither riparian owner may, however, obstruct or divert the passage of the stream by building out into the bed (*Bickett* v. *Morris*, *ubi sup.*).]

(b) *Doe* v. *Pearsey* (1827) 7 B. & C. 304 (country road).
Re White's Charities [1893] 1 Ch. 659 (street in town).
Holmes v. *Bellingham* (1859) 7 C. B. N. S. 329 (private road).

[And a conveyance of land abutting on such river or road will, unless there are expressions to the contrary, convey the soil as far as the *medium filum* (*Micklethwaite* v. *Newlay Bridge Co.* (1886) 33 Ch. D., at p. 145, *per* Cotton, L. J.). But the presumption may be rebutted by special circumstances (*Beckett* v. *Corporation of Leeds* (1871) L. R. 7 Ch. App. 421). For example, it has no application where the boundary is a railway (*Thompson* v. *Hickman* [1907] 1 Ch. 550).]

Accretion of soil

1345. Where a plot of land is bounded by a natural stream or the sea, and by natural causes the position of the water is imperceptibly changed, the boundary line is changed accordingly;[a] unless (perhaps) there is a definite boundary-mark otherwise fixed.[b] This rule applies to tidal, non-tidal, navigable, and non-navigable water.[c]

(a) *R.* v. *Yarborough* (1824) 3 B. & C. 91 (accretion from sea).
Re Hull & Selby Ry. (1839) 5 M. & W. 327 (loss).
Foster v. *Wright* (1878) 4 C. P. D. 438.

(b) *Re Hull & Selby Ry.*, *ubi sup.*
A. G. v. *Chambers* (1859) 4 De G. & J., at p. 70, *per* Chelmsford, C.
Foster v. *Wright*, *ubi sup.*, at p. 447, *per* Lindley, J.
Hindson v. *Ashby* [1896] 2 Ch. 1 (doubtful).
(c) *Foster* v. *Wright*, *ubi sup.*, at p. 448, *per* Lindley, J.

[The rule has no application to sudden diversions (*Re Hull & Selby Ry.*, *ubi sup.*, at p. 332, *per* Abinger, C. B.). But the mere fact that the change can be identified by maps, etc., does not prevent it applying where the process of change is imperceptible (*Foster* v. *Wright*, *ubi sup.*, *Hindson* v. *Ashby*, *ubi sup.*). There seems to be no English decision on accretion in the case of lakes.]

Hedge and ditch

1346. When lands are separated by a hedge and artificial ditch, the presumption is, that the boundary between them is on that edge of the ditch which is furthest from the hedge.

Vowles v. *Miller* (1810) 3 Taunt. 137, *per* Lawrence, J.
Doe v. *Pearsey* (1827) 7 B. & C., at p. 307, *per* Holroyd, J.
Henniker v. *Howard* (1904) 90 L. T. 157.

[The rule has (probably) no application to boundaries formed by natural watercourses (*Marshall* v. *Taylor* [1895] 1 Ch. 641); and there is no presumption as to the width of an artificial ditch (*Vowles* v. *Miller*, *ubi sup.*, at p. 38).]

Boundary trees

1347. A tree growing near a boundary belongs, in the absence of special provision, to the occupier of the soil in which the main body of the tree is; notwithstanding that its branches overhang adjacent soil. If the main body extends across the boundary,

the tree will belong to the owners of the two plots as tenants in common.

Masters v. *Pollie* (1620) 2 Rolle Rep. 141 (doubtful).
Anon. (1622) *ibid.* 255.
Waterman v. *Soper* (1698) 1 Ld. Raym. 737.
Holder v. *Coates* (1827) Moo. & Malk. 112.
Lemmon v. *Webb* [1894] 3 Ch., at p. 20, *per* Kay, L. J.

[For the rights of an occupier whose land is overhung by the branches of his neighbour's tree, see *ante*, Bk. I, § 181.]

Boundary wall

1348. Apart from Act of Parliament, a boundary wall is presumed to belong to the owners of the adjoining plots as tenants in common, in proportion as the base rests on each plot respectively.

Wiltshire v. *Sidford* (1827) 1 Man. & R. 404.
Cubitt v. *Porter* (1828) 8 B. & C. 257.
Standard Bank v. *Stokes* (1878) 9 Ch. D. 68.
Watson v. *Gray* (1880) 14 Ch. D. 192.

[Of course, the presumption may be rebutted by proof of circumstances shewing an intention to maintain each part of the wall as separate property (*Matts* v. *Hawkins* (1813) 5 Taunt. 20).]

Mines

1349. When a person is entitled, under a conveyance or exception, to all the mines or minerals in a piece of land, or to a mine of a particular mineral, he is entitled to the air-space occupied by such mines or minerals; but this rule does not apply to the conveyance or exception of a particular mineral.

Bowser v. *Maclean* (1860) 2 De G. F. & J., at p. 420, *per* Lord Campbell, C., as interpreted by
Eardley v. *E. Granville* (1876) 3 Ch. D., at p. 834, *per* Jessel, M. R.

Proud v. *Bates* (1864) 34 L. J. Ch. 406.
D. of Hamilton v. *Graham* (1871) L. R. 2 H. L. (Sc.) 166.
Batten v. *Kennedy* [1907] 1 Ch. 256.

[The rule does not apply to the air-space occupied by minerals which, by virtue of copyhold custom, belong to the lord of a manor. Therefore the latter, after working the minerals, has no right to use the space thus created for passing to tenements outside the manor (*Lewis* v. *Branthwaite* (1831) 2 B. & Ad. 437). It will, of course, be realized, that a grant or exception of mines and minerals themselves is a totally different thing from a grant of the profit *à prendre* described in § 1259, *ante*. The latter conveys an incorporeal, the former a corporeal hereditament.]

Right of support

1350. The occupier of land has a right to the support of the soil in its natural condition by adjacent [a] and subjacent [b] land.

(a) *Corpn. of Birmingham* v. *Allen* (1877) 6 Ch. D. 284.
Jordeson v. *Sutton* [1899] 2 Ch. 217.
(b) *Harris* v. *Ryding* (1839) 5 M. & W. 60. (But this was rather derogation from grant.)
Humphries v. *Brogden* (1848) 12 Q. B. 739.
Dixon v. *White* (1883) L. R. 8 App. Ca., at p. 842, *per* Lord Blackburn.

[If buildings are placed upon the land, the soil is no longer in its natural condition (*Wyatt* v. *Harrison* (1832) 3 B. & Ad. 871, and other cases). But if, at the time of the severance of the surface and the sub-soil, buildings were standing on the surface, the occupier of the surface has, in the absence of special circumstances, a right to the support of them by the sub-soil (*Bonomi* v. *Backhouse* (1858) E. B. & E. 628; *New Sharlston Co.* v. *Westmorland* (1900) 82 L. T. 725 (H. L.)). It is important to notice, that the duty of support only falls on the occupier of so much adjacent land as would suffice to support the land of the plaintiff in its natural state (*Corporation of Birmingham* v. *Allen*, *ubi sup.*). The right of support of buildings by buildings, and of new buildings by land, is discussed *ante*, § 1248. It is a true easement, which may be acquired by prescription. At one time, there seems to have been a doctrine,

that the owner of a building, as to which no right of support had been acquired by prescription or grant, was entitled to an action against his neighbour, if the latter, knowing of the existence of the building, negligently excavated his own land and caused the building to fall or be injured (*Chadwick* v. *Trower* (1839) Bing. N. C. 1). But this doctrine seems now to be exploded (*Dalton* v. *Angus* (1881) L. R. 6 App. Ca., at p. 804, *per* Lord Penzance).]

Mine owner and surface

1351. The owner of mines or minerals apart from the surface has not, in the absence of special circumstances,[a] the right to enter upon or destroy the surface, in order to win the minerals.[b] But he has the right to win such minerals in any reasonable manner without injury to the surface.[c]

(a) E. g. such as those in *D. of Buccleuch* v. *Wakefield* (1870) L. R. 4 H. L. 377.

(b) *Bell* v. *Wilson* (1866) L. R. 1 Ch. App. 303, followed in *Hext* v. *Gill* (1872) L. R. 7 Ch. App. 699.
Butterknowle v. *Bishop Auckland* [1906] A. C. 305.

[This rule does not apply to the exercise of the rights of landowners to minerals excepted from conveyances under the Railways Clauses Consolidation Act, 1845, ss. 77–79 (*Ruabon Co.* v. *G. W. R.* [1893] 1 Ch. 427, since followed).]

(c) *Rowbotham* v. *Wilson* (1860) 8 H. L. C., at p. 360, *per* Lord Wensleydale.
Whidborne v. *Ecclesiastical Commrs.* (1877) 7 Ch. D. 375.
Hayles v. *Pease* [1899] 1 Ch. 567. (In this case the mine owners had power to enter upon the surface.)

Incidental damage

1352. The occupier of a mine may, as between himself and the occupier or owner of a subjacent mine, work out the whole of his minerals in a usual

and skilful manner; even though the result of such working may be to admit water to the upper mine and thence into the lower, or otherwise to damage the latter.

Smith v. *Kenrick* (1849) 7 C. B. 515.
Wilson v. *Waddell* (1876) L. R. 2 App. Ca. 95.

[It is very difficult to reconcile these decisions with those in *Baird* v. *Williamson* (1863) 15 C. B. N. S. 376, and *Crompton* v. *Lea* (1874) L. R. 19 Eq. 115; especially the latter. But the view of the Court in both those cases apparently was, that what the defendant was doing, or proposed to do, was a deliberate flooding of the plaintiff's mine. For the curious case in which the defendant's action abstracted brine from the plaintiff's mine, see *Salt Union* v. *Brunner Mond* [1906] 2 K. B. 822.]

Fences

1353. The occupier of land has no right, independently of statute, contract, prescription, or custom,[a] to call upon his neighbour to erect or maintain fences.[b] But if a person lawfully sinks a shaft, or opens a quarry, through or in the surface of the soil, or occupies such shaft or quarry when made, he must fence such shaft or quarry for the protection of the occupier of the surface.[c]

(a) *Keighley's Case* (1609) 10 Rep. 139 a
Star v. *Rookesby* (1710) 1 Salk. 335
Lawrence v. *Jenkins* (1873) L. R. 8 Q. B. 274
} (prescription).
Child v. *Hearn* (1874) L. R. 9 Ex. 176 (statute).
Firth v. *Bowling Iron Co.* (1878) 3 C. P. D. 254 (contract).
Coaker v. *Willcocks* [1911] 2 K. B. 124 (custom).

(b) *Boyle* v. *Tamlyn* (1827) 6 B. & C. 329. (This case and the next show, that the mere fact of continually repairing a fence is not conclusive evidence of prescriptive liability to do so.)
Hudson v. *Tabor* (1877) 2 Q. B. D. 290.

[There is not even any liability implied from the fact that the claimant's land was demised to him by the adjoining occupier (*Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756).]

(c) *Sybray* v. *White* (1836) 1 M. & W. 435.
Williams v. *Groucott* (1863) 4 B. & S. 149.
Hawkes v. *Shearer* (1887) 56 L. J. Q. B. 284.

TITLE III — AS REGARDS PERSONS HAVING FUTURE INTERESTS

Waste

1354. The rights and liabilities of occupiers of land, as regards persons having future or reversionary interests therein, are governed by the Law of Waste. Waste is either 'legal' or 'equitable.'

[For 'ameliorating waste,' see *ante*, § 1078.]

Legal waste

1355. Subject to § 1358, legal waste consists of any act[a] ('voluntary waste') or neglect[b] ('permissive waste') which changes, or diminishes the value of, the inheritance.

(a) *City of London* v. *Greyme* (1607) Cro. Jac. 182.
Darcy v. *Askwith* (1618) Hob. 234.
Simmons v. *Norton* (1831) 7 Bing. 640.
West Ham v. *E. London Waterworks* [1900] 1 Ch. 624.
Rose v. *Hyman* [1911] 2 K. B., at p. 243, *per* Cozens-Hardy, M. R.
(b) *Anon.* (1564) Moo. 62.
Griffiths' Case (1564) *ibid.* 69.
Stickleborne v. *Hatchman* (1585–6) Owen, 43.

Equitable waste

1356. Equitable waste consists of such acts as change the character or diminish the value of the

inheritance, and are an unconscientious abuse of the legal powers of the tenant.

Aston v. *Aston* (1749) 1 Ves. Sen. 264.
Burges v. *Lamb* (1809) 16 Ves. 174.
M. of Ormonde v. *Kynnersley* (1820) 5 Madd. 369.
Marker v. *Marker* (1851) 9 Hare, 1.
Micklethwaite v. Micklethwaite (1857) 1 De G. & J. 504.
Turner v. *Wright* (1860) Johns. 740.
Baker v. *Sebright* (1879) 13 Ch. D. 179.

[The conception of 'equitable waste' arose from the practice adopted by settlors of limiting life estates 'without impeachment of waste.' Such a limitation exempted the life tenants from all common law liability for waste, in respect even of active or 'voluntary' waste. But, in the leading case of *Vane* v. *Lord Barnard* (1716) 2 Vern. 738, the Court of Chancery assumed a power to restrain by injunction acts of malicious injury done by tenant for life 'without impeachment'; and such acts now even involve (in the absence of express justification) a legal liability in damages (Judicature Act, 1873, s. 25 (3)). Nevertheless, the term 'equitable waste' continues to be used.]

Articles severed

1357. Things improperly severed from the freehold by a tenant impeachable for waste, or severed by tempest or other accident, belong to the owner of the first vested estate of inheritance in the land, and can be sued for by him in Trover against the tenant or a stranger.[a] But where such things are lawfully severed by a tenant, the property therein vests in him.[b]

(a) *Herlakenden's Case* (1589) 4 Rep. 62 a.
Paget's Case (1593) 5 Rep. 76 b.
Lewis Bowles' Case (1615) 19 Rep., at 81 b.
Berry v. *Heard* (1622) Cro. Car. 242.
Whitfield v. *Bewit* (1724) 2 P. Wms. 240.
Seagram v. *Knight* (1867) L. R. 2 Ch. App., at p. 632.

[The estate of a deceased tenant for life is liable for the proceeds of his waste (*M. of Ormonde* v. *Kynnersley* (1820) 5 Madd. 369).]

(b) *Lewis Bowles' Case, ubi sup.*, at 82 b (overruling on this point *Herlakenden's Case, ubi sup.*).
Aston v. *Aston* (1749) 1 Ves. Sen., at p. 265, *per* Lord Hardwicke, C.

[The ordinary remedy for equitable waste was an account and impounding of the proceeds to follow the trusts of the settlement (*Honywood* v. *Honywood* (1874) L. R. 18 Eq., at p. 31, *per* Jessel, M. R.). *Quære:* since the Judicature Act. For the case of collusion between a tenant for life and remainderman, see *Birch Wolfe* v. *Birch* (1870) L. R. 9 Eq. 683.]

Ordinary use and precautions

1358. Nothing is waste which merely involves the reasonable user of the premises, or the taking of the ordinary profits of the soil,(a) or which is necessary for the protection or proper management of the inheritance.(b)

(a) *Barrett* v. *Barrett* (1627) Hetley, 34.
Phillips v. *Smith* (1845) 14 M. & W. 589.
Harris v. *Ekins* (1872) 26 L. T. 827.
Saner v. *Bilton* (1878) L. R. 7 Ch. D. 815.

[*Semble*, it is on this ground that a tenant, though not 'without impeachment,' is allowed to take the produce of periodical cuttings on 'timber estates,' i. e., lands customarily employed principally for the production of timber (*Bagot* v. *Bagot* (1863) 32 Beav., at pp. 517–18, *per* Romilly, M. R.; *Dashwood* v. *Magniac* [1891] 3 Ch. 306), and to work open mines. As to estovers, see §§1074, 1139, *ante*].

(b) *Honywood* v. *Honywood, ubi sup.*, at p. 311, *per* Jessel, M. R.
Tucker v. *Linger* (1883) L. R. 8 App. Ca. 508.

Fixtures

1359. Generally speaking, it is an act of waste to sever fixtures (Bk. I, § 42) from the freehold.

Co. Litt. 53 a.

But:—

(i) a tenant for life [a] or years [b] may, during his term, or (in the case of tenant for life) within a reasonable time afterwards,[c] remove fixtures put up by him for purposes of trade, ornament, or domestic use; doing no serious damage to the inheritance, and making good such damage as may be done;

(a) *Lawton* v. *Lawton* (1743) 3 Atk. 13.
Re Hulse [1905] 1 Ch. 406.
(b) *Poole's Case* (1703) 1 Salk. 368.
Re Moser (1884) 13 Q. B. D. 738.
Lambourne v. *McClellan* [1903] 2 Ch. 268.
(c) *Leigh* v. *Taylor* [1902] A. C. 157.
Re Hulse, ubi sup.

(ii) the tenant of a farm or lands, under the Landlord and Tenant Act, 1851,[a] and the tenant of an agricultural holding, under the Agricultural Holdings Act, 1908,[b] have such rights to remove fixtures as are specified in those statutes respectively;

(a) S. 3.
(b) S. 21.

(iii) the execution creditor of a tenant for years [a] (but not of a tenant for life) [b] may exercise the tenant's rights to remove fixtures.

(a) *Poole's Case, ubi sup.*
(b) *Winn* v. *Ingilby* (1822) 5 B. & Ald. 625.

NOTE.

[The liability for waste attaching to the various kinds of limited interests in land will be found specified under the respective Titles of Sect. I, *ante*, dealing with such interests. See especially, §§ 1049, 1076–1078, 1098, 1143, 1164, 1189 n. (c).]

ADDENDUM TO TITLE III

LEGAL WASTE

The following acts and omissions have been held or judicially stated to amount to legal waste: —

A — VOLUNTARY WASTE

1. Cutting timber.

Skelton v. *Skelton* (1677) 2 Swanst. 170 n.
Whitfield v. *Bewit* (1724) 2 P. Wms. 240.
Perrot v. *Perrot* (1744) 3 Atk. 95.
Hussey v. *Hussey* (1820) 5 Madd. 44.
Honywood v. *Honywood* (1874) L. R. 18 Eq. 306.

[As to what is 'timber,' see remarks of Jessel, M. R., in *Honywood* v. *Honywood*, *ubi sup.*, at p. 309, and *Dashwood* v. *Magniac* [1891] 3 Ch. 306. No trees other than oak, ash, and elm, can be timber, except by virtue of local custom. A curious point should be noticed. If the settlor excepts the trees from the tenant's estate, then cutting them is not Waste, but Trespass (*Lewknor's Case* (1586) 4 Leon. 162, 225; *Goodright* v. *Vivian* (1807) 8 East, 190). This was important when waste involved forfeiture; and, even now, may be material, e. g. on the Statutes of Limitation.]

2. Cutting other wood, in a way which a prudent owner of the inheritance would not follow.

Sir George Stripping's Case (1621) Winch, 15.
O'Brien v. *O'Brien* (1751) Ambl. 107.
Kaye v. *Banks* (1770) 2 Dickens, 431.
Chamberlayne v. *Dummer* (1792) 3 Bro. C. C. 549.
Honywood v. *Honywood* (1874) L. R. 18 Eq., at p. 310.

3. Destruction or alteration of buildings.

Cooke's Case (1581) Moo. 178.
City of London v. *Greyme* (1607) Cro. Jac. 181.
Gage v. *Smith* (1613) Godb. 209.
Green v. *Cole* (1670) 2 Wms. Saund. 252; 1 Lev. 309.
Young v. *Spencer* (1829) 10 B. & C. 145.

[Whatever may have been the case at one time, the erection of buildings is not now, *per se*, waste (*Jones* v. *Chappell* (1875) L. R. 20 Eq. 539).]

4. Ploughing up ancient meadow or pasture.

Maleverer v. *Spinke* (1537) Dyer, 35 a.
Lord Darcy v. *Askwith* (1618) Hobart, 234.
Atkins v. *Temple* (1625) 1 Rep. in Ch. 14 (ancient pasture).
Cole v. *Peyson* (1636) *ibid.* 1036 (do.).
Fermier v. *Maund* (1638) *ibid.* 116 (do.).
Goring v. *Goring* (1676) 3 Swanst. 661 (do. meadow).
Simmons v. *Norton* (1831) 7 Bing. 640.

[There is, however, a distinct reaction against this doctrine (*D. of St. Albans* v. *Skipwith* (1845) 8 Beav. 354; *Rush* v. *Lucas* [1910] 1 Ch. 437). And it has been greatly modified by s. 26 of the Agricultural Holdings Act, 1908.]

5. Opening new mines, or re-opening abandoned mines.

Saunders v. *Marwood* (1599) 5 Rep. 12 a.
Astrey v. *Ballard* (1676) Freem. K. B. 445.
Viner v. *Vaughan* (1840) 2 Beav. 466.
Bagot v. *Bagot* (1863) 32 Beav., at p. 516, *per* Romilly, M. R.
Clegg v. *Rowland* (1866) L. R. 2 Eq. 160.
Re Baskerville [1910] 2 Ch. 329.

[Whether a mine is 'open' or 'dormant' (abandoned) is a question of fact in each case (*Bagot* v. *Bagot*, *ubi sup.*). It is not waste for the tenant to sink new shafts or pits for the purpose of working open mines (*Clavering* v. *Clavering* (1726) 2 P. Wms. 388; *Cowley* v. *Wellesley* (1866) L. R. 1 Eq. 656; *Elias* v. *Snowdon Quarries* (1879) L. R. 4 App. Ca., at p. 466, *per* Lord Selborne). But the bed of a stream is not an open mine; and a tenant for years, impeachable for waste, who takes from it minerals deposited by the action of the stream, is guilty of waste (*Thomas* v. *Jones* (1841) 1 Y. & C. C. C. 510).]

B — PERMISSIVE WASTE

6. Failure to scour ditch, whereby foundations of house become rotten.

Stickleborne v. *Hatchman* (1585–6) Owen, 43.

7. Suffering buildings to be out of repair, whereby they are destroyed by weather.

Anon. (1564) Moo. 62.

8. Allowing a sea or river wall to become ruinous, whereby water enters and floods the land.

Griffiths' Case (1564) Moo. 69.
Anon. (1564) *ibid.* 62.

9. Suffering cattle to bite the germins of underwood which the tenant has felled.

Gage v. *Smith* (1613) Godb. 209.

[The cases of permissive waste are few and not very modern. But it appears to be indisputable, that the possibility of a claim for permissive waste is recognized by law.]

EQUITABLE WASTE

The following acts have been held to amount to equitable waste : —

10. Destroying or seriously damaging the principal mansion house.

Vane v. *Lord Barnard* (1716) 2 Vern. 738.
Rolt v. *Somerville* (1737) 2 Eq. Ca. Ab. 759.
D. of Leeds v. *Amherst* (1846) 2 Ph. 117.

[Where the settlor had virtually abandoned the mansion house before the date of the settlement, and the tenant for life pulled it down and used the materials for rebuilding, this was held not to be equitable waste (*Morris* v. *Morris* (1858) 3 De G. & J. 323).]

11. Cutting down trees planted or left by an absolute owner for ornament or shelter for the mansion house; (a) except for the purpose of preserving the remaining trees.(b)

(a) *Abraham* v. *Bubb* (1680) 2 Freem. Ch. 53.
Lawley v. *Lawley* (1717) Jac. 71 n.
Packington's Case (1744) 3 Atk. 215.
M. of Downshire v. *Sandys* (1801) 6 Ves. 107.
Marker v. *Marker* (1851) 9 Ha. 1.
(b) *Ford* v. *Tynte* (1864) 2 De G. J. & S. 127.
Baker v. *Sebright* (1879) 13 Ch. D. 179.

[Whether the trees are in fact ornamental or not, is immaterial (*Coffin* v. *Coffin* (1821) Jac. 70; *Wombwell* v. *Belasyse* (1825) 6 Ves. 110 n.). The question turns on the intention of the settlor.]

12. Cutting down thriving wood unfit for the purposes of timber.

O'Brien v. *O'Brien* (1751) 1 Ambl. 107.
Tamworth v. *Ferrers* (1801) 6 Ves. 419.
Smythe v. *Smythe* (1818) 2 Swanst. 251.

INDEX TO BOOK III

SECTIONS I (*continued*) AND II